

2483
No. 11662-11666

see vol 2482
United States

Circuit Court of Appeals

For the Ninth Circuit.

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

IN FOUR VOLUMES

VOLUME IV

Pages 1267 to 1635

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

RALPH W. KIBBEE

a witness called by and on behalf of the defendant Himmelfarb, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Ralph W. Kibbee.

The Clerk: Your address?

The Witness: 1132 North Highland Avenue.

Mr. Katz: May I at this time, if the Court please, hand to the Court for information and guidance a schedule that has been prepared?

The Court: A copy of which you have handed to Government counsel?

Mr. Katz: A copy of which I have handed to Government counsel.

Direct Examination

By Mr. Katz:

Q. Mr. Kibbee, what is your business or occupation?

A. I am a certified public accountant.

Q. Are you licensed to practice as a certified public accountant in the State of California?

A. I am.

Q. How long have you been engaged in the practice as a certified public accountant in this state?

A. About 10 years.

Q. Are you licensed to practice before the Treasury Department of the United States?

A. I am.

Q. Are you a member of any professional societies or associations?

(Testimony of Ralph W. Kibbee.)

A. I am a member of the California State Society of Certified Public Accountants.

Q. As a certified public accountant, have you prepared income tax returns? A. I have.

Q. Have you prepared such returns on both a calendar and a fiscal year basis?

A. Yes.

Q. Have you prepared income tax returns on both cash and accrual basis? A. Yes.

Q. Have you, as a certified public accountant, verified and audited returns prepared by others?

A. Yes, I have.

Q. Mr. Kibbee, I place before you Exhibits 4, 5, 6, GG and HH. I will ask you to look at Exhibit 4, which is a photostatic copy of the original returns of the defendant Phillip Himmelfarb for the calendar year 1944. I will ask you if you have seen that exhibit prior to taking the stand in this case? [1206]

A. I have.

Q. I will ask you if you also saw a copy of Exhibit 6 prior to the time that you say Exhibit—I will withdraw that. I am referring to Exhibit 4.

A. I did see a copy of this before.

Q. I will ask you to look at Exhibit 6, which is a photostatic copy of the original joint venture return of the defendants Phillip Himmelfarb and Sam Ormont for the fiscal year May 1st, 1944 to April 30, 1945. I will ask you if you saw that exhibit prior to the time that you took the stand in this case? A. I did.

(Testimony of Ralph W. Kibbee.)

Q. I will ask you whether or not you saw a copy of this exhibit prior to the time you saw Exhibit 6?

A. I did.

Q. I will now direct your attention to the photostatic copy of the income tax return for the defendant Phillip Himmelfarb for the year 1945, which is Exhibit GG. I will ask you whether or not you saw a copy of that exhibit prior to the time you took the stand in this case?

A. I did.

The Court: And HH?

The Witness: Yes, sir, and HH.

Q. (By Mr. Katz): And 5?

A. And 5, yes, sir. [1207]

Q. Mr. Kibbee, have you computed the income tax for the 1944 return—that is Exhibit 4—based upon the income reported and the deductions taken in that return?

A. I have.

Q. Is the income tax as shown on that return, Exhibit 4, based upon the income reported and deductions taken in such return, true and correct?

A. It is.

Mr. Strong: I object to that, your Honor. It calls for a conclusion.

The Court: Yes. This is opinion evidence.

Mr. Strong: On a matter of law.

The Court: The same class of evidence that Mr. Eustice gave.

Mr. Strong: Your honor indicated the tax due was a matter of law.

The Court: His opinion on calculations are a matter of law. [1208]

(Testimony of Ralph W. Kibbee.)

Q. (By Mr. Katz): Have you computed the income tax on the 1945 return for the defendant Phillip Himmelfarb, which is Exhibit GG, based upon his income reported and deductions taken in such return? A. I have.

Q. Is the income tax shown on that return GG, as based upon the income therein shown and the deductions therein taken, true and correct?

A. It is.

Q. Is the amount that is shown on the joint venture return, Exhibit 6, reported as income in the 1945 returns filed for the defendant Phillip Himmelfarb and Ruth Himmelfarb, his wife?

A. It is.

Q. Have you recomputed the 1944 return of the defendant Phillip Himmelfarb by allocating a part of the income from the joint venture reported in the 1945 return, Exhibit GG, to the 1944 return, Exhibit 4? A. I have.

Q. Has the amount that you allocated to the 1944 return been added to the net income shown in the 1944 return as filed? A. I have.

Mr. Strong: Objected to, your Honor. It is indefinite and doesn't say what amount. I don't know what we are talking [1209] about here.

Mr. Katz: It is preliminary, that question, your Honor.

The Court: He is coming up to that. That is what he is getting at.

Mr. Strong: All right.

Mr. Katz: May I have the answer?

The Court: He has. This is on his calculation?

(Testimony of Ralph W. Kibbee.)

Mr. Katz: Yes, your Honor.

Q. What is the amount that you added to the 1944 return in such recomputation?

Mr. Strong: Objected to on the ground there is no proper foundation laid for his adding any amount. There is no showing what sums should or should not be taken, even on the basis of the defendant's story. If he just picks an *amount of thin air* it doesn't mean anything.

The Court: This is preliminary.

Mr. Strong: He is getting to the figures, now, your Honor.

The Court: I know he is getting to the figures, but obviously what he is doing is taking the calculations on the basis that Mr. Eustice allocated the return for that year.

Mr. Katz: Not precisely, your Honor.

Mr. Strong: That is the point.

Mr. Katz: The testimony will establish where he gets the figures. Eustice's testimony did not come in as against us and I am not using the figure that Mr. Eustice used and the [1210] testimony will establish where the figure came from.

The Court: This is all opinion evidence and it is a matter of calculations and all of these are hypotheses and sooner or later the jury are going to have to determine, in the event the case gets to them, whether or not the hypotheses are correct. That is to say, the assumption that such and such was his income or was not his income.

The question was, what was the figure?

The Witness: The figure was \$13,641.11.

Q. (By Mr. Katz): Where did you get that figure, Mr. Kibbee?

A. That figure was determined as being the addition to the income for the year 1944 for Count 2 of the indictment and the bill of particulars.

Q. How did you arrive at that amount that you have just stated, \$13,641.11 from Count 2 of the indictment and bill of particulars?

A. I arrived at that amount by subtracting from the total amount shown in the bill of particulars as belonging to the year 1944 a total of \$18,252.65, deducting from that amount the amount shown on the defendant's 1944 personal income tax return of \$4611.54, the difference being the amount that the Government has added to his net income.

Q. And is that amount that you arrived at by that computation the amount that is shown in the indictment as being [1211] the net income in Count 2 for the defendant Phillip Himmelfarb for the year 1944?

A. It is.

Q. What is the total amount of the tax as recomputed by you and calculated on the basis of the net income as shown on the 1944 return, plus the additional amount of \$13,641.11?

A. That total tax is \$5843.91.

Q. Did you recompute the 1945 return filed by the defendant Phillip Himmelfarb on the basis of the net income as shown on that return, less the deduction of the amount of \$13,641.11 which you allocated to the year 1944?

A. I did.

Q. What is the total amount of the tax as recom-

(Testimony of Ralph W. Kibbee.)

puted by you upon the basis of the net income as shown in the 1945 return, less the amount of \$13,641.11 as allocated to 1944?

A. A total tax is \$1881.85.

Q. What is the total amount of the tax for the years 1944 and 1945 as shown by the returns for these years as filed by the defendant Phillip Himmelfarb? A. \$8891.97.

Q. What is the total amount of the tax for the years 1944 and 1945 as recomputed by you upon the addition of the \$13,641.11 to 1944 and the deduction of that amount from 1945?

A. The total recomputed tax is \$7725.78. [1212]

Q. Mr. Kibbee, what is the difference in dollars and cents between those two totals?

A. \$1166.19.

Q. With respect to the returns for the years 1944 and 1945, as filed, does that amount which you have just given as the difference, represent an overpayment or an underpayment by the defendant?

Mr. Strong: This is still opinion, your Honor?

The Court: This is still opinion, on the assumption that the calculations were according to this witness' calculations.

A. It represents an overpayment.

Q. (By Mr. Katz): Mr. Kibbee, following the same methods of valuation and calculation for Ruth Himmelfarb's returns, would the tax, as recomputed, be substantially the same as for the defendant Phillip Himmelfarb?

A. It would be substantially the same, except

(Testimony of Ralph W. Kibbee.)

for a minor differential represented by an additional exemption, or a one less exemption on the part of the wife.

Q. Would such recomputation for Ruth Himmelfarb, including the variation by reason of the exemption, result in an overpayment in the same manner as you testified in respect to the defendant Phillip Himmelfarb?

A. It would still result in an overpayment.

Q. How much would the total overpayment amount to for [1213] both the defendant Phillip Himmelfarb, and Ruth Himmelfarb, his wife?

A. Approximately double the \$1166.19, except for the minor variation.

The Court: Excuse me just a moment. I will have to take a short recess. You will remain in the box. [1214]

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: So stipulated, your Honor.

Mr. Robnett: Yes, your Honor.

The Court: Proceed.

Q. (By Mr. Katz): Mr. Kibbee, you have prepared a set of schedules showing the computations you have just testified to? A. Yes.

Q. And those are the schedules that I have presented to Court and counsel in this case?

A. Yes.

Q. Have you recomputed the returns for the calendar years 1944 and 1945 utilizing a figure as an addition to 1944 and a deduction from 1945

(Testimony of Ralph W. Kibbee.)

which is other and different from the amount used in the recomputation you have just testified to?

A. I have.

The Court: By the way, Mr. Eustice's calculations were marked for identification, weren't they?

Mr. Strong: Yes, your Honor.

The Court: These should be marked as well so that the record will know what we are talking about. This one you testified about a few moments ago will be KK and the one just handed to Court and counsel will be LL for identification. [1215]

(The documents referred to were marked Defendant's Exhibits KK and LL respectively for identification.)

Q. (By Mr. Katz): Mr. Kibbee, what figure did you use in the recomputation last mentioned?

A. I took the amount of the joint venture share of the profits, which was distributed to Phillip Himmelfarb and allocated that upon the basis of the number of days that the joint venture was in existence during the year 1945 and the number of days that the joint venture was in existence during the year 1944. Such fractional apportionment amounts to 245 days of the joint venture's fiscal year falling within the calendar year 1944 and 120 days of the joint venture's fiscal year falling in the calendar year 1945. The fractions therefore are $\frac{245}{365}$ falling in the calendar year 1944 and $\frac{120}{365}$ falling in the calendar year 1945.

(Testimony of Ralph W. Kibbee.)

Q. On the basis of the apportionment of the share of the joint venture reported by defendant Phillip Himmelfarb falling within the year 1944, being as you stated 245/365, what is the figure so arrived at? A. \$11,979.63.

The Court: That is 245/365 of the total reported, is that right?

The Witness: That is right, sir. [1216]

Q. And what is the total amount of the tax as recomputed by you, on the basis of the net income as shown in the 1944 return, plus the additional amount of \$11,979.63, which represents the fractional interest or share allocated to 1944?

A. That total tax is \$5005.59.

Q. What is the total amount of the tax as recomputed by you, on the basis of the net income as shown on the 1945 return, less the amount of \$11,979.63 allocated to the year 1944 as the fractional share falling within that year?

A. That tax amounts to \$2,454.39.

Q. What is the total amount of the tax for the years 1944 and 1945 as recomputed by you, on the basis of allocating the fractional shares for the year within which they fall?

A. The total recomputed tax for both years together would be \$7,459.98.

Q. What is the difference in dollars and cents between the total as so recomputed by you, the last recomputation you testified about, and the sum of \$8891.97, which you testified was the total tax for 1944 and 1945, as those returns were filed?

A. Such difference is \$1431.99.

(Testimony of Ralph W. Kibbee.)

Q. With respect to the returns for the years 1944 and 1945, as filed, does the difference of \$14,031.99—

A. Correction, please. \$1431.99.

Q. —\$1431.99 represent an overpayment or an under [1217] payment?

A. It represents an overpayment.

Q. Following the same method of computation and calculation for Ruth Himmelfarb's returns for the year 1944 and 1945, as you followed in the computation just testified to, would such recomputation be the same as for the defendant Phillip Himmelfarb's return?

A. It would be substantially the same except for the minor differential which arises by the fact that Ruth Himmelfarb has only one dependent as against Phillip Himmelfarb's two.

Q. Would such recomputation for Ruth Himmelfarb, on the basis just testified to, including the minor variations you have referred to, result in an overpayment by her in the same manner as it does in the recomputation made for the defendant Phillip Himmelfarb?

A. It would result in the same type of overpayment.

Q. How much would that total overpayment amount to for both defendant Phillip Himmelfarb and his wife, on the basis of the recomputation just testified to?

A. Substantially double the amount of \$1431.99, except for the minor variation.

(Testimony of Ralph W. Kibbee.)

Q. Did you have prepared a set of schedules showing the recomputation you just testified to?

A. I have. [1218]

Q. And those are the schedules which have been handed to counsel and the Court, marked Defendant's No. LL? A. Yes.

Q. Mr. Kibbee, at my request have you totaled these——

A. Just one minute, please, to compute this. If counsel please I would like to take out a few minutes to verify the year 1945. I can testify with relation to the year 1944.

Q. What do you require to complete your computation for the year 1945?

The Court: Computing what?

Mr. Katz: Computing the total of the checks.

The Court: Exhibit II?

Mr. Katz: Exhibits II and Exhibit JJ, if the Court please.

The Court: All together?

Mr. Katz: No, separately.

The Witness: II is complete, sir. JJ I still require a few moments on. [1219]

The Court: Go ahead and compute it.

The Witness (making calculation): I am ready.

Q. (By Mr. Katz): Mr. Kibbee, what is the total of the checks comprising Exhibit II for identification? A. \$631.20.

Q. Do the returns of Phillip Himmelfarb and Ruth Himmelfarb for the year 1944 show a tax withhold? A. It does; they both do.

(Testimony of Ralph W. Kibbee.)

Q. What is the total amount of the tax withhold shown on the two returns for 1944?

A. \$356 on one return and \$434.80 on the other return.

Q. Have you added the withhold of those two returns to the amount of \$631.20, which is the total of Exhibit II for identification? A. I have.

Q. What is the total result of adding the \$631.20 and the two withholds shown in the 1944 returns?

A. \$1422 even.

Q. I will ask you now to look at the tax returns for the year 1944 and state whether or not that amount of \$1422 is the total tax shown by those two returns. A. It is.

Mr. Katz: At this time, if the Court please, we offer into evidence the checks payable to the Collector of Internal [1220] Revenue marked for identification as II.

Mr. Strong: If counsel will state that these are the checks in payment of the tax I will accept his word for it. I don't want to waste time checking it.

Mr. Katz: Those were. I have been so advised.

Mr. Strong: Then I have no objection on that basis.

The Court: Admitted in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit II.)

Q. (By Mr. Katz): Mr. Kibbee, have you totaled the checks comprising Exhibits JJ for identification? A. I have.

(Testimony of Ralph W. Kibbee.)

Q. Will you state what the total amount is of the checks comprising Exhibits JJ?

A. \$14,406.94.

Q. Do the returns of the defendant Phillip Himmelfarb and his wife Ruth Himmelfarb show a withhold on the 1945 returns? A. They do.

Q. And what is the total amount of such withhold, or what are the separate amounts shown on each return?

A. The separate amounts are \$837.30 and \$837.29.

Q. Have you added the amount shown on the returns for the year 1945 as tax withheld to the total of the checks comprising [1221] Exhibit JJ for identification? A. I have.

Q. What is the total you arrived at by such addition? A. \$17,081.53.

Q. I will ask you to look at the total tax shown on the 1945 returns for the defendant Phillip Himmelfarb and his wife and state whether or not the amount of tax so shown is the amount you have just stated as the total of the checks plus withhold.

A. The amount of tax shown on the two returns totaled \$16,751.93, a difference of \$329.60 as against the amount of checks and withholding in Exhibit JJ. There is a mathematical error some place that cannot be seen for the moment. The payments total \$329.60 more than the amount of the tax as shown combined. [1222]

Mr. Katz: If the Court please, we offer in evidence Exhibit JJ for identification.

(Testimony of Ralph W. Kibbee.)

Mr. Strong: We object to that, your Honor. Of course, there is this error of \$300 and some odd dollars which has not been computed in the 1944 return. I don't know what it has to do with in this case, if anything. Possibly in payment of something else. We object upon the ground that no proper foundation has been laid for Exhibit JJ.

The Court: No proper foundation. Objection sustained.

Q. (By Mr. Katz): Mr. Kibbee, will you please take a look at the returns for the year 1945, and please state whether or not those returns have a stamp showing payment.

Mr. Strong: I will stipulate that they have, your Honor.

Mr. Katz: Is it stipulated that the payment of tax has been paid as shown on those returns?

The Court: If it is stamped as paid, it was paid.

The Court: I think that was the stipulation made previously in the trial.

Mr. Katz: Yes.

The Court: But that was not the basis of my sustaining the objection, because no foundation has been laid. This witness is purely an opinion witness. There is no foundation laid, because there is no testimony that these were actually used in payment of the tax. [1223]

Mr. Katz: Except, it was payable to the Collector of Internal Revenue, and I can't for the moment explain the overpayment. No further questions. Cross-examine.

(Testimony of Ralph W. Kibbee.)

Cross-Examination

By Mr. Strong:

Q. When were you first retained in connection with this case, Mr. Kibbee? A. Yesterday.

Q. That's the first time you had anything to do with these income tax returns, or the matters you have testified to? A. That is right.

Q. As I understand it, what you have testified to, all your calculations were based upon this document in evidence here, which is Government's Exhibit 4, is that right? That's Phillip Himmelfarb's 1944 return? A. That is right.

Q. Then you used Government's Exhibit 5, which is Ruth Himmelfarb's 1944 return?

A. That is right.

Q. Then you used Government's Exhibit 6, which is the fiscal year return for both Ormont and Himmelfarb? A. That is right.

Q. Then you also used this document which has been marked Defendant's Exhibit GG, which is the 1945 return for Phillip Himmelfarb? [1224]

A. That is right.

Q. Then you used this document marked HH, which is the 1945 return for Ruth Himmelfarb?

A. Right.

Q. Did you have any discussions regarding these matters with Mr. Phillip Himmelfarb, or Mrs. Ruth Himmelfarb? A. No.

(Testimony of Ralph W. Kibbee.)

Q. So you don't know of your own knowledge whether any of the figures or statements in these returns are true, or aren't true?

A. That is right.

Q. You just took them as they are shown, and you assumed they would be true, because they so reported?

A. That is right.

Q. Then you simply did a mathematical calculation, as you testified to?

A. That's right.

Q. Based upon these assumptions you have indicated?

A. Correct.

Q. You have, in your schedules, and in your testimony, assumed that if you took certain sums from the 1945 reported income, and added them to the 1944 income, you would get different results?

A. Right.

Q. You don't know, as a matter of fact, whether any of [1225] these sums came from one year or the other: you are just basing your answer on the returns themselves?

A. That is right.

Q. That is correct for the 345/365ths, which is the number of days; you just split up arbitrarily?

A. Not arbitrarily. That is an accepted matter of dividing the income, where the details are not known or when.

Q. You took 345 days, which was the 1944 portion you found, and you took that portion from the entire fiscal year return?

A. That is right.

Q. That, you say, is the accepted method?

A. Right.

(Testimony of Ralph W. Kibbee.)

Q. When you made all these computations, how much tax was overpaid and underpaid, and everything else, which you testified to, that all assumes certain matters are true? A. That is right.

Q. But you have no knowledge of that?

A. Correct.

Q. Let me ask you, if the sum of \$11,979.63, which you allocated to the year 1944 for Phillip Himmelfarb, as part of the joint venture sum of \$70,000 odd thousand dollars, if that was earned in 1944, and if that was added to the sum he reported of \$4611.54, then, isn't it true, if that was earned on a calendar year basis that should have been reported in his [1226] 1944 return, in the sum of \$16,091.17, shown on your schedule?

Mr. Katz: Objected to, if the Court please. That is now calling for a question of law which the Court must determine.

Mr. Strong: Same opinion that they have been asking him all morning, your Honor.

The Court: No, it isn't the same opinion they have been asking him all morning. It is so obvious I do not know why there should be any question about it. The objection is sustained.

Mr. Strong: You mean the answer is obvious, your Honor? It is obvious I won't ask any questions to get at it then.

The Court: The witness is offered solely as an expert witness on assuming certain hypotheses.

Q. (By Mr. Strong): Now this schedule which you prepared, as I understand it—I am not quite

(Testimony of Ralph W. Kibbee.)

clear on it—on the calculation of the 1944 share of the joint venture income you have only testified to the amounts that you have allocated to Phillip Himmelfarb and then you said that a similar amount would be allocated to Ruth Himmelfarb.

A. That is right.

The Court: I think I will overrule counsel's objection to the last question.

Mr. Strong: I will reframe it, your Honor.

Q. If I remember what I asked you before, if you added the sum of \$11,979.63, which on your document LL there you [1228] have allocated as earned in 1944, that is, Mr. Himmelfarb's share of the community income as I understand it, and if you added that to the amount that he reported for 1944, \$4611.54, then the amount—assuming that those sums were in 1944—then the amount for that year which should have been reported was \$16,591.17?

A. That is right.

Q. And the tax on that which should have been reported and paid, assuming those are the amounts he earned in that year, would have been—

A. That is on the next page.

Q. —\$5005.59?

A. That is right.

Q. And then the same or almost the same amount would have been paid and reported by Mrs. Himmelfarb?

A. That is right.

Q. And the amount that Mrs. Himmelfarb should have reported was based upon the income of the joint venture which was earned by Phillip Himmelfarb?

A. That is right.

(Testimony of Ralph W. Kibbee.)

Q. And that was a total income for Phillip Himmelfarb split up on a community income basis?

A. That is right.

Q. And I assume that the same thing goes for the other figures which you have testified to here and you have split [1229] them up on that basis, half to Mrs. Himmelfarb and half to Mr. Himmelfarb?

A. That is correct.

Mr. Strong: That is all. Thank you.

The Court: Step down. This witness may be excused?

Mr. Strong: Yes, your Honor.

(Witness excused.)

The Court: Next witness.

Mr. Katz: If the Court please, at this time we will call Mr. Joe Abrams.

JOE ABRAMS

called as a witness by and in behalf of the defendant Himmelfarb, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Joe Abrams.

The Clerk: Your address?

The Witness: 1249 South Ogden.

The Clerk: Take the stand.

Direct Examination

By Mr. Katz:

Q. Mr. Abrams, what is your business or occupation?

A. Salesman.

(Testimony of Joe Abrams.)

Q. Do you know the defendant Phillip Himmelfarb?
A. Yes, I do. [1230]

Q. How long have you known him?

A. About five years.

Q. Have you transacted business with him?

A. Yes, I have.

Q. Have you had business transactions with him which involve the payment of bills and indebtedness?
A. Yes, sir.

Q. Do you transact business with other persons who transact business with Mr. Himmelfarb?

A. Yes, sir.

Q. Do you know Mr. Himmelfarb's reputation for truth, honesty and integrity and the paying of his bills and meeting his obligations in the community in which he lives?
A. Yes, I do.

Q. What is that reputation, good or bad?

A. To my knowledge it has been good.

Mr. Katz: Cross-examine.

Mr. Strong: No questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Katz: Call Mr. Bedder.

PETE BEDDER

called as a witness by and in behalf of the defendant Himmelfarb, having been first duly sworn, was examined and testified [1231] as follows:

The Clerk: Your name?

The Witness: Pete Bedder.

(Testimony of Pete Bedder.)

The Clerk: How do you spell it?

The Witness: B-e-d-d-e-r.

The Clerk: Your address?

The Witness: 6331 Lindenhurst Avenue.

The Clerk: Take the stand.

Direct Examination

By Mr. Katz:

Q. Mr. Bedder, do you know the defendant Phillip Himmelfarb? A. Yes, I do.

Q. How long have you known him?

A. About three or four years.

Q. Have you transacted business with him?

A. I have.

Q. Did such transactions involve the payment of bill and indebtedness to you? A. Yes.

Q. Do you transact business with other persons who transact business with Mr. Himmelfarb?

A. Yes, I do.

Q. Do you know Mr. Himmelfarb's reputation for truth, honesty, integrity and the paying of his bills in the meeting [1232] of his obligations in the community in which he lives?

A. Yes.

Q. What is that reputation, good or bad?

A. Very good.

Mr. Katz: Cross-examine.

Cross-Examination

By Mr. Strong:

Q. What business are you in?

A. Life insurance business.

(Testimony of Pete Bedder.)

Mr. Strong: No questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Katz: Mr. Ray, please.

FREDERICK L. RAY

called as a witness by and in behalf of the defendant Himmelfarb, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Frederick L. Ray.

The Clerk: R-a-y?

The Witness: Yes.

The Clerk: Your address?

The Witness: 539 South Berendo.

The Clerk: Take the stand. [1233]

Direct Examination

By Mr. Katz:

Q. Mr. Ray, do you know the defendant Phillip Himmelfarb? A. I do.

Q. How long have you known him?

A. About five years.

Q. Have you transacted business with him?

A. Yes, sir.

Q. Have you transacted business with other persons who have transacted business with him?

A. I have.

Q. Did such transactions involve the payment of bills and indebtednesses? A. That is right.

(Testimony of Frederick L. Ray.)

Q. Do you know Mr. Himmelfarb's reputation for truth, honesty, integrity and the paying of his bills and the meeting of his obligations in the community in which he lives? A. Yes, sir.

Q. What is that reputation, good or bad?

A. Very good, sir.

Mr. Katz: Cross-examine.

Cross-Examination

By Mr. Strong:

Q. What business are you in? [1234]

A. Real estate broker.

Q. He always pays his bills on time?

A. As far as I know.

Q. He has money to pay bills?

A. That is right.

Mr. Strong: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Katz: Mr. Vincent.

LOUIS VINCENT

called as a witness by and in behalf of the defendant Himmelfarb, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Louis Vincent.

The Clerk: Your address?

(Testimony of Louis Vincent.)

The Witness: 6714 Denny, North Hollywood.

The Clerk: Take the stand.

Direct Examination

By Mr. Katz:

Q. Mr. Vincent, do you know the defendant Phillip Himmelfarb? A. Yes, sir; I do.

Q. How long have you known him? [1235]

A. About 15 years.

Q. Do you know other persons that know Mr. Himmelfarb? You have mutual friends and acquaintances? A. Yes, sir.

Q. Do you know what his reputation is for truth, honesty and integrity? A. Very good.

Mr. Katz: No further questions.

Cross-Examination

By Mr. Strong:

Q. Mr. Vincent, where did you first know Mr. Himmelfarb? A. Cleveland, Ohio.

Q. When did he come here?

A. Well, he come here about—I couldn't just recall the exact year—about eight years ago or so.

Mr. Strong: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Katz: Mr. Chauncey Bowlus Chauncey.

CHAUNCY BOWLUS CHAUNCY

called as a witness by and in behalf of the defendant Himmelfarb, having been first duly sworn, was examined and testified as follows: [1236]

The Clerk: Your name?

The Witness: Chauncy Bowlus Chauncy.

The Clerk: How do you spell your middle name?

The Witness: B-o-w-l-u-s.

The Court: Your first name is the same as your last name?

The Witness: Yes, sir.

The Clerk: Your address?

The Witness: 124 North Parkwood Boulevard, Pasadena.

The Clerk: Take the stand.

Direct Examination

By Mr. Katz:

Q. Mr. Chauncy, do you know the defendant Phillip Himmelfarb? A. I do.

Q. How long have you known him?

A. Between four and five years.

Q. Do you know other persons that know him?

A. Lots of them.

Q. Do you know what Mr. Himmelfarb's reputation for truth, honesty and integrity in the community in which he lives is?

A. Very excellent.

Mr. Katz: No further questions.

Mr. Strong: No questions. [1237]

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Katz: The defendant Phillip Himmelfarb rests, if the Court please.

The Court: The defendant Himmelfarb rests.

Do you wish to make an opening statement now, Mr. Robnett?

Mr. Robnett: Yes, I would like to make one, your Honor.

The Court: Very well. [1238]

OPENING STATEMENT IN BEHALF OF DEFENDANT ORMONT

Mr. Robnett: May it please your Honor, Mr. Strong, and ladies and gentlemen of the jury, it is customary in the trial of an action for the attorney representing clients to make a statement to the jury of what they are going to prove. As his Honor told you, we have a right to make this at various stages of the proceedings. I reserved the right to make mine at this time, before starting any evidence on behalf of my client, Mr. Ormont.

The reason for that was that I did not know until the prosecution put in their case what we would be expected to meet, and therefore, I could not make any statement before that time.

It has developed already, through cross-examination of the prosecution's witnesses, most of the defense of my client. Therefore, the evidence that I shall now offer to you, and the proof I expect to put in, will be very brief. It will be largely this:

I expect to prove that Mr. Ormont at all times during the years involved here, that is, up until

1944, had, in addition to the moneys that he had in banks, in his various bank accounts—had various and considerable sums of cash that he kept otherwise than on deposit in the bank; that he had accumulated that cash over a course of a great many years, and that starting in, possibly the latter part of 1942, but anyway in 1943. [1239]

That he utilized most of that cash in the purchase of Government bonds, and the balance of what cash he had on hand he used in the purchase of bonds in the early part, or sometime in the year 1944. And I expect the proof to show you also that many of the exhibits that have already been offered and introduced by me in evidence here, which are checks principally, were used by Mr. Ormont in the purchase of bonds during that time, and that with those funds, and those funds only, which are claimed by the other side they could not find and explain, he paid for all bonds that he did buy, and that he has reported all of his income.

And on that showing I shall ask at your hands a verdict for the defendant.

At this time, if the Court please, there are, I believe, two exhibits that possibly did not get into the evidence, and I thought they were. One is FF.

Mr. Katz: If the Court please, may I ask the Court to excuse all the witnesses who have testified?

The Court: All the witnesses who have testified this morning may be excused.

Mr. Robnett: FF is now offered in evidence.

Mr. Strong: No proper foundation has been laid, your Honor.

Mr. Robnett: Counsel stipulated that I might use these [1240] copies in lieu of the originals, and has also stipulated that the tax shown on it has been paid.

Mr. Strong: That is true.

The Court: I think, in view of the stipulation that this is entitled to be admitted, and it is admitted. I don't know, thinking of further foundation—there isn't any testimony in the evidence that Dora Goldberg is the mother, or related to the defendant Ormont.

Mr. Robnett: There are witnesses who have testified——

Mr. Strong: We will stipulate that Dora Goldberg is the name of the defendant's mother.

The Court: Very well. It is admitted in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit FF.)

Mr. Robnett: And Exhibit I does not appear to have been admitted in evidence.

Mr. Strong: Those are the bank records.

The Court: Did you offer them?

Mr. Robnett: I offer them at this time.

The Court: Admitted.

Mr. Katz: May it be admitted, if the Court please, as against the defendant Sam Ormont only?

The Court: As against Sam Ormont?

Mr. Katz: I am sorry. They are going in on behalf of Sam Ormont, and not against the defendant Himmelfarb, and are [1241] not binding upon him in any way.

Mr. Strong: I may make a motion to apply later this evidence as against both defendants.

The Court: The evidence as now offered by Mr. Robnett is offered as to the defendant Sam Ormont only, and is not to be considered by the jury in any way in connection with the defendant Phillip Himmelfarb.

Mr. Katz: Thank you, your Honor.

(The document referred to was received in evidence as Defendant Sam Ormont's Exhibit I.)

Mr. Robnett: If your Honor is going to take a forenoon recess, I would prefer to wait until after that time to start my evidence. If you are not, I will start it now.

The Court: Maybe we had better have a short recess. Remember the admonition.

(Short recess.) [1242]

The Court: Usual stipulation?

Mr. Robnett: So stipulated.

Mr. Katz: Yes, your Honor.

Mr. Strong: So stipulated.

The Court: Call your witnesses:

Mr. Robnett: I will ask the defendant Sam Ormont to take the stand, please.

SAM ORMONT

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Sam Ormont.

The Clerk: Your address?

The Witness: 407 North Cornwell Street.

The Clerk: Los Angeles?

The Witness: Los Angeles.

The Clerk: Take the stand.

Mr. Katz: If the Court please, may we at the outset have the understanding that any testimony of this witness on his own behalf is not to be binding on the defendant Himmelfarb?

The Court: It will not be considered by the jury as to the defendant Himmelfarb.

Mr. Katz: Thank you, your Honor. [1243]

Direct Examination

By Mr. Robnett:

Q. Mr. Ormont, I am going to place before you Exhibit S, being the check in your favor by Acme Meat Company for \$1332.27, and Exhibit T, being a group of checks by you to various payees, and Exhibit W. Will you kindly examine Exhibit T, the checks therein. A. Yes.

Q. Mr. Ormont, what were those checks given by you to those payees for?

A. Those were for livestock purchases.

(Testimony of Sam Ormont.)

Q. Will you now examine Exhibit S, I believe it is, a check from the Acme Meat Company to you for \$1332.27 and tell the jury what that check was given to you for?

A. This check was a reimbursement to myself from the company for the livestock purchases on my personal account.

Q. Represented by Exhibit T? A. Yes.

Q. I will ask you now to examine Exhibit W, which is application for purchase of United States Government bonds, Defense Series G, in the amount of \$7000, in which you are named as the purchaser but which bonds were ordered to be made out to you, Sam Ormont, and mother, Dora Goldberg, and they are dated 1/9/1943. I ask you to state whether or not the moneys you received back from the Acme Meat Company in [1244] Exhibit S were used by you on account of the purchase of those \$7000 worth of bonds?

Mr. Strong: You Honor, I think it is a little bit leading. I would like to have the witness testify. I object on the ground that the questions are leading.

The Court: The question is leading. However, he is merely saving time, and instead of taking ten direct questions to get the answer you get to the same place by the one question. Objection overruled.

The Witness: No, this check was not used to purchase these bonds.

Q. (By Mr. Robnett): Was it used by you to purchase any bonds? A. Yes, it was.

(Testimony of Sam Ormont.)

Q. I will now show you Exhibit V, which is a check of the Acme Meat Company to you for \$5000, and ask you to kindly examine it. I will ask you to state what you used that check for.

A. I used this check for the purchase of bonds.

Q. I will now ask you examine Exhibit P——

The Court: What date is that?

Mr. Robnett: The \$5000 one is dated 1/9/1943.

The Court: Did you purchase bonds on or about that date?

The Witness: Yes, your Honor. [1245]

Q. (By Mr. Robnett): Was it used, Exhibit V, the \$5000 check, used by you in purchasing the \$7000 worth of bonds represented by Exhibit W?

A. Yes, it was.

The Court: When? What is the date of the check?

Mr. Robnett: The check is dated January 8, 1943, and the application is dated January 9, 1943.

Q. While on the subject of Exhibit W, Mr. Ormont, do you at this time remember what additional funds in addition to Exhibit V, the \$5000 check, were used by you in purchasing those \$7000 worth of bonds?

A. Well, I believe there was a series of additional checks that were used in this purchase of the \$7000 worth of bonds.

Q. When you say a series of checks, were they your personal checks or someone's else?

A. I believe they were company withdrawal checks and possibly personal checks too. [1246]

(Testimony of Sam Ormont.)

Q. I will now show you Exhibit Y, which contains, I believe, eight \$100 checks of the Acme Meat Company, made payable to you, dated commencing with November 20, 1942, and on along and ending with January 8, 1946, and ask you to examine those checks. Have you examined them? A. Yes.

Q. Can you state what those checks were used for by you?

A. They were used in the purchase of bonds.

Q. Referring then to the \$7000 purchase, do you know whether or not they were used in that purchase? Would you look at the purchase slip, please?

A. Yes, they were used on that purchase.

Q. I will also show you Exhibit 6, which is a check dated December 11, 1942, made payable to you, and signed by United Dressed Beef Company, for the sum of \$204.75, and ask you to examine that. What was that check used for?

A. That was used in the purchase of bonds.

Q. And referring to Exhibit W, do you know whether it was used on the purchase of this \$7000 worth of bonds? A. Yes.

Q. I now show you Exhibit Z, which is a check of your own, made payable to yourself, and endorsed in blank, for \$595.25, and I will ask you what that check was used for?

A. This check was used for the purchase of bonds. [1247]

Q. Referring to Exhibit W, I will ask you if you know whether or not it was used on the purchase of those \$7000 worth of bonds?

A. Yes, sir, it was.

(Testimony of Sam Ormont.)

Q. Referring now to Exhibit W, and Exhibits V, Y, X and Z, the last four of which you have said were used on the purchase of bonds represented in Exhibit W, and which are for the several amounts of \$5000, eight \$100 checks, the check for \$204.75; another check for \$595.25, making, I believe, a total of \$6600.00, I will ask you if you now can tell the jury how you paid the balance of the purchase price of Exhibit W, which was \$7000? It would be \$400.

A. There was \$400 in currency used in this transaction.

Q. Referring to Exhibit X, which is a check from the United Beef Company to you for \$204.75, what was that used in payment of, if anything.

A. That was used in payment of a loan that I had made to the United Dressed Beef Company; interest on the loan.

The Court: What is their name?

The Witness: Borne.

Q. (By Mr. Robnett): Mr. Ormont, I am now showing you Exhibit O, a check of the Acme Meat Company to you for \$206.11, the check being dated 5/11/1942, and I am showing you Exhibit P, being your [1249] personal check to an Arthur P-a-c-h-e-c-o, it looks like, for \$206.11, dated 5/11/1942. Will you examine those, please? Referring now to Exhibit P, being the check of yourself to Arthur P-a-c-h-e-c-o, for \$206.11? Will you kindly tell the Court and jury what that was given for?

(Testimony of Sam Ormont.)

A. This check, made out to Arthur Pacheco, on my personal checking account, was for the purchase of several calves. I don't recollect just how many; and it amounted to \$206.11. [1249]

Q. I will ask you now to examine Exhibit O and tell me what that check was given to you for by the Acme Meat Company.

A. This was to reimburse me for the amount of the purchase that I made from my personal account.

Q. That is represented by Exhibit P?

A. Yes.

Q. What did you do with the funds from the Exhibit O, the return to you of your money that you had previously advanced, in the sum of \$206.11?

A. I believe I deposited it in my personal account, if I am not mistaken.

Q. Do you know whether or not it was used by you either directly or through your personal account on the purchase of bonds?

A. Well, I don't believe that check was used in the purchase of bonds.

Q. I will now show you Exhibit R, being a check signed by you in favor of Security-First National Bank of Los Angeles for \$8147.73, and ask you to examine that—the date is 5/1/1943—have you examined that? A. Yes, I have.

Q. Will you state to the Court and jury what that check was used for?

A. This check was used for the purchase of bonds.

(Testimony of Sam Ormont.)

Q. Do you recall the total amount of bonds that you [1250] purchased at the time you gave the check?

A. I believe it was a \$10,000 transaction.

Q. I will now again show you Exhibit S, being the check of the Acme Meat Company to you for \$1332.27, and which you have heretofore said you did use in the purchase of bonds, and ask you whether or not that check, in connection with Exhibit R you have just testified concerning, was used in the purchase of the bonds you have just mentioned.

A. Yes, this check was used in the purchase of those bonds.

Mr. Strong: Which check was that?

Mr. Robnett: That was the Exhibit S, I believe.

Mr. Strong: Thank you.

Mr. Robnett: As I calculate those two checks would amount to \$5480.

Mr. Strong: Is this a matter of opinion, your Honor?

The Court: He is getting ready to ask another question, I suppose.

Mr. Robnett: Yes, your Honor.

Q. —leaving \$520 balance to be paid on those bonds, if I am correct in my figures, and I will ask you, Mr. Ormont, if you can tell the jury what additional money or funds you used to make up that \$520 on the purchase of those \$10,000 worth of bonds.

A. I believe there was a \$50 bond interest check that [1251] was used, there was a \$20 item—I don't

(Testimony of Sam Ormont.)

know whether it was a money order or something of that type—and I believe \$450 in currency.

Mr. Robnett: I will ask to have this marked for identification, please.

The Clerk: MM.

(The document referred to was marked Defendant's Exhibit MM for identification.)

The Court: What was the date of that last transaction you were discussing?

Mr. Robnett: I think I can give it to you, your Honor.

The Court: Just the approximate date.

The Witness: About May 1st.

The Court: 1943?

The Witness: 1943.

The Court: All right.

Mr. Robnett: Did you get the information you wished?

The Court: Yes, thank you.

Q. (By Mr. Robnett): I now show you Exhibit MM for identification and ask you to examine that, it being a check of your own made payable to Benjamin Kosdon, dated February 1, 1943, for \$750. Have you examined it? A. Yes, I have.

Q. What was that check given for? [1252]

A. That was a loan to Mr. Kosdon.

Q. And did Mr. Kosdon repay that loan?

A. Yes, he did.

Q. When? A. About two months later.

Q. Do you remember in what manner he repaid it?

(Testimony of Sam Ormont.)

A. He gave me three Government checks, Government issue—I don't know exactly what they were—they were three Government checks amounting to approximately \$750 and some change.

Q. Some cents?

A. I believe it was about 76 cents, if I am not mistaken.

Q. \$750.76? A. Yes.

Q. According to your best recollection?

A. Yes.

Q. And what did you do with those Government checks?

A. I used those to purchase a bond.

Q. I show you Exhibit CC in this case——

By the way, I offer in evidence Exhibit MM, if the Court please.

Mr. Strong: I think it is irrelevant and immaterial, no connection shown as being within the issue of this case, having nothing to do with it.

The Court: Objection overruled.

(The document referred to was received in evidence and marked Defendant's Exhibit MM.)

Q. (By Mr. Robnett): Now showing you Exhibit CC, a check of your own dated April 3, 1943, payable to the Treasurer of the United States for \$249.26, I will ask you what you used that check for.

A. I used this check for the purchase of a bond.

Q. State whether or not that check, together with the Government checks you have just said that you received from Mr. Kosdon, were used together in the purchase of bonds.

(Testimony of Sam Ormont.)

A. Yes, they were used to buy a \$1000 G bond.

Mr. Robnett: I would like to have these checks marked for identification. I believe they can be marked as one.

The Clerk: NN.

(The documents referred to were marked Defendant's Exhibit NN for identification.)

Q. (By Mr. Robnett): Now, showing you Exhibit NN, containing a check dated November 30, 1942, made payable to yourself, for \$10,000, signed United Beef Company, by Sam Borne; and a check dated February 2, 1943, made payable to you for \$6000 signed United Beef Company by Sam Borne, I will ask you to examine that exhibit, and those checks. For what purpose were those checks given to you?

A. They were in repayment of a loan.

Q. How much was the original loan?

A. The original loan was \$6000.

Q. I mean the total loan, I should say.

A. The two checks?

Q. The total loan that they repaid.

A. \$16000.

Q. Mr. Ormont, were the funds that you received on those two checks, Exhibit NN, the first check, that is, the earliest dated check, being \$10,000, and the latter check being for \$6000—were those funds, or any part of them, used by you in the purchase of bonds? [1255]

A. Yes, they were.

(Testimony of Sam Ormont.)

Mr. Robnett: I offer these checks NN in evidence.

Mr. Strong: Objected to upon the ground that they are incompetent, irrelevant and immaterial, and not shown to be within the issues in this case.

The Court: Objection overruled. They are admitted in evidence.

(The documents referred to were received in evidence and marked Defendant's Exhibit NN.)

Mr. Robnett: I show these to counsel. I would like to have these three checks marked as our next exhibit.

The Clerk: OO.

(The documents referred to were marked Defendant's Exhibit OO for identification.)

Q. (By Mr. Robnett): I now show you Exhibit OO, consisting of a check dated March 11, 1941, made payable to F. Salter, for \$200, the check being signed by you, and endorsed F. Salter; the next check being dated March 22, 1941, payable to F. Salter, a \$7000 check, signed by you, and endorsed F. Salter; the next check being dated March 8, 1941, in your favor, for \$100, made out by Acme Meat Company, and endorsed S. Ormont, and underneath F. Salter, and ask you to examine those checks. Have you examined them?

A. Yes. [1256]

(Testimony of Sam Ormont.)

Q. What were those checks given by you for, the first two being made payable to Mr. Salter? What were they given for?

A. For a loan.

Q. The third one, being Acme Meat, payable to you, to whom did you give that?

A. To Mr. Salter.

Q. Are those three checks all on a loan or loans?

A. Yes, all of these comprised a loan.

Q. Constituting a total of \$1000? A. Yes.

Q. Was that loan ever repaid to you?

A. It was.

Q. In what year? A. In the year 1942.

Q. In what form was it repaid, if you recall, whether it was in cash or in checks?

A. A combination of two checks and currency.

Q. Do you remember the division, as to how much were in checks and how much currency?

A. A very small percentage in checks, and the balance, the bulk of it in currency.

Mr. Robnett: I offer Exhibit OO in evidence.

Mr. Strong: Same objection, your Honor.

The Court: Objection overruled. [1257]

(The documents referred to were received in evidence and marked Defendant's Exhibit OO.)

Q. (By Mr. Robnett): I now show you Exhibit AA, consisting of a check of the Acme Meat Company to you for \$100, dated January 22, 1943, and a similar check from the Acme Meat Company to

(Testimony of Sam Ormont.)

you for \$100 dated January 29, 1943, and ask you to examine them, please. What were those checks given to you for?

A. They were a withdrawal from the Acme Meat Company. [1258]

Q. What did you use them for, if you recall?

A. I used those in the purchase of a bond.

Q. Did you use any additional funds in the purchase of that bond? A. Yes, I did.

Q. And can you tell us at this time what you used? A. I used \$550 currency.

Q. The cost of the bond was \$750?

A. A Series E bond; yes.

The Court: That was in 1943?

The Witness: Yes, your Honor.

Q. (By Mr. Robnett): Mr. Ormont, I will ask you to state whether or not at or near the end of the year 1941 you had any cash or currency belonging to you that was not on deposit in any bank.

A. Yes.

Q. Will you state to the Court and the jury approximately how much money in cash or currency you so had? A. About \$11,000 or \$12,000.

Q. What if anything did you do with that currency or cash thereafter? That would be after 1941.

A. The bulk of it was used to purchase bonds.

Q. In what year did you use the most of it for purchasing bonds? A. In 1943. [1259]

Q. At this time do you know definitely how much of that was used for that in that year 1943?

A. Between \$8000 and \$9000.

(Testimony of Sam Ormont.)

Q. And the balance of it, what was that used for? A. In the purchase of bonds.

Q. In what year? A. In 1944.

Q. Now, Mr. Ormont, were you ever acquainted with a man by the name of Kane? A. Yes.

Q. Did you ever have any business transactions with him along about 1942?

A. Well it goes a little earlier than that.

Q. I will ask you this, did you ever loan him any money? A. Yes, I did.

Q. How much money did you loan him?

A. \$500.

Q. When did you loan him that?

A. Sometime in 1938, I believe.

Q. Did he ever repay it? A. Yes, he did.

Q. What year did he repay it?

A. In 1942.

Q. In what manner did he repay it, that is, what form [1260] did the payment take, was it checks or currency or what? A. In currency.

Q. What did you do with the \$500 that he repaid?

A. I think I deposited it in my personal account.

The Court: Had you made any practice before 1941 to carry large sums of currency?

The Witness: About my person?

The Court: Yes.

The Witness: I didn't carry large quantities with me, your Honor.

The Court: Had you made it a practice to have either currency on your person or currency available other than banks?

(Testimony of Sam Ormont.)

The Witness: No, I didn't carry it about my person.

The Court: Or available to you other than banks?

The Witness: Oh, yes; it was available to me at any time.

The Court: How long had you had that practice?

The Witness: It has been a practice for a great many years.

Q. (By Mr. Robnett): Could you give the Court and jury an idea about how long you had had the practice of keeping some of your funds in that form as currency or cash?

A. From back in 1928.

Q. 1928? [1261] A. Yes, sir.

Q. And throughout the years up until about '42, did you continue to put some of your money or keep some of your money in that form? A. Yes.

Q. The money that you had testified to, the amount that you finally had in 1941, state whether or not that was an accumulation of the funds you had so kept and saved during those years from 1928.

A. I didn't get that question completely, please.

Mr. Robnett: Read the question, Mr. Reporter.

(The question referred to was read by the reporter as set forth above.)

The Witness: Yes, it was.

The Court: How long were you in the business?

The Witness: I started in the early part of '28.

The Court: In the early part of 1928?

The Witness: Yes.

(Testimony of Sam Ormont.)

The Court: Do you recall, for instance, how much currency you had on hand when the banks were closed in 1933?

The Witness: Well, I can't estimate it exactly, your Honor. I presume around——

The Court: Your best recollection.

The Witness: Between \$4000 and \$5000.

The Court: Did you use that in your business during [1262] that period?

The Witness: No, I didn't.

The Court: You did not?

The Witness: No, I did not.

Q. (By Mr. Robnett): I will ask you, you started in business, did you not, that is, in the slaughtering business or meat business—I don't know which it was—about 1928 with Mr. Salter?

A. Yes.

Q. Prior to that time had you been employed in any gainful occupation? A. Yes, I had.

Q. And from that employment had you any funds when you went into business that was not in the form of currency?

A. I believe I had.

The Court: What was your occupation?

The Witness: I was a driver for a meat company.

The Court: A driver for a meat company?

The Witness: Yes.

Q. (By Mr. Robnett): And at a time prior to that occupation, what had you been doing?

A. I had worked for the Southern California Telephone Company. [1263]

(Testimony of Sam Ormont.)

The Court: I want to ask a question. You may wish to object to it. I won't wish to be offensive, Mr. Ormont, but where were you born?

The Witness: Saint Johnsbury, Vermont.

The Court: Saint Johnsbury, Vermont?

The Witness: Yes, your Honor.

The Court: You came here when?

The Witness: When I was about nine months old.

The Court: With your parents?

The Witness: With my parents, yes, your Honor.

Q. (By Mr. Robnett): Mr. Ormont, as to your habit of keeping some of your funds in currency, would you state to the Court and jury what your reason was for so doing?

A. Well, when I first started my mother had a very unfortunate experience in her early days in Los Angeles. She lost quite a bit of her savings in a couple of small bank failures, and she always advised me never to keep all of my eggs in one basket.

Q. That was the reason you did that?

A. Yes.

Q. And you continued to do that until you finally invested these funds in these bonds, is that correct?

A. Correct.

Mr. Robnett: You may cross-examine. [1264]

Cross-Examination

By Mr. Strong:

Q. What were the banks that failed, Mr. Ormont?

(Testimony of Sam Ormont.)

A. There was a Japanese bank my mother had in funds, and I don't recollect the other one. It was one of the banks in our neighborhood, we were living in at the time.

Q. You don't remember the name?

A. No, I don't.

Q. And I assume that this cash which you talk about was accumulated from your earnings when you were with the Acme Meat Company, with Mr. Salter, that is, from earnings in the Acme Meat Company?

A. Some of it.

Q. You had living expenses? A. Yes.

Q. Do you occupy a house? A. Yes.

Q. How big is the house?

A. A six-room house.

Q. How long have you had it?

A. I haven't had it.

Q. Whose is it? A. It is my mother's.

Q. Have you contributed toward the expense of your mother during the last two or three years?

Mr. Robnett: Objected to as not cross-examination.

The Court: No, that is not.

Mr. Strong: Can I make it part of my direct of this witness, at this time?

The Court: You can't call this witness as your witness.

Mr. Strong: I can't make him my witness for the purpose of the question, your Honor?

The Court: I am afraid you can't, counsel. After all, you are representing the Government.

(Testimony of Sam Ormont.)

This is a defendant. And a witness cannot be compelled to testify against himself. You may cross-examine him on questions counsel opened. Under no circumstances can you call him as your witness.

Mr. Strong: Do I understand I am limited to just cross-examination?

The Court: That is correct, of any defendant.

Q. (By Mr. Strong): Mr. Ormont, as to Exhibit NN, the two checks, one for \$10,000, and one for \$6,000, I understand you said you bought bonds with the proceeds of those checks?

A. They ultimately went into bonds.

Q. You say this was a repayment of a loan?

A. Yes.

Q. And when the money which you loaned was originally earned, I assume that was entered by you as part of the income for that year? [1266]

Mr. Robnett: Objected to as not cross-examination; incompetent, irrelevant and immaterial.

Mr. Strong: Those checks that he talked about, your Honor.

The Court: No, you are coming back to the year now, when he allegedly earned that money. That was your question, whether or not it was earned before that year. That is incompetent, irrelevant and immaterial.

Mr. Strong: I am testing his credibility as to what this money was, and where it went.

The Court: I understood your question was as to the year he earned that money, and whether he reported it as income.

Mr. Strong: Yes.

(Testimony of Sam Ormont.)

The Court: Objection sustained.

Q. (By Mr. Strong): Do you know which bonds you bought with the checks represented by NN?

A. No, these particular items I wouldn't identify.

Q. The checks OO, I understood those two checks to Mr. Salter were in repayment of a loan, and the other check. What did you say was done with the proceeds from all those three?

A. Will you restate the question?

Q. What was done with the proceeds?

The Witness: I mean the first part.

Mr. Strong: I have changed it. Strike my question. [1267]

The Court: His testimony was that they were a loan.

Q. (By Mr. Strong): They were a loan?

A. Yes.

Q. Did you use those to buy bonds?

Mr. Robnett: I object to that upon the ground that it is incompetent, irrelevant and immaterial, and it shows on its face they were made to Mr. Salter. He could not have used them.

The Court: Objection overruled.

The Witness: State it again.

Q. (By Mr. Strong): I want to know whether you bought bonds with this money?

A. No, I don't believe I did.

Q. When was the loan made by Mr. Salter to you with which this was a repayment?

(Testimony of Sam Ormont.)

The Court: That was not his testimony. His testimony was that he loaned that money to Mr. Salter.

Q. (By Mr. Strong): Was that loan repaid?

A. Yes, it was.

Q. When was that?

A. It was repaid in 1942.

Q. It was entered on your books, I assume?

A. There were no books on that.

Q. No books on that loan? A. No.

Q. This check MM, Benjamin Kosdon, \$750, which says: Payment of loan of 3040 Sunset Boulevard,—did you record the receipt of the loan on your books?

A. There were no books on that either.

The Court: Was that a personal loan?

The Witness: Yes.

The Court: For the Acme Meat Company?

The Witness: No, it was out of my personal funds, your Honor.

Q. (By Mr. Strong): You mean the repayment was out of your personal funds?

A. No, the issuance of it was to Mr. Kosdon out of my personal funds.

Q. This check——

Mr. Robnett: Will you speak louder?

Mr. Strong: I will be glad to.

Q. This transaction of \$6,000 and \$10,000—\$16,000, which is Exhibit NN, was that recorded on your books as a loan?

A. No, that was not recorded on the books.

(Testimony of Sam Ormont.)

The Court: Was that a loan from you personally, or from [1269] the Acme Meat Company?

The Witness: It was from myself personally.

The Court: We will recess until 2:00 o'clock. Remember the admonition.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.)

Los Angeles, California, June 11, 1947

2:00 o'Clock P. M.

The Court: Usual stipulation?

Mr. Strong: Yes, sir.

Mr. Robnett: Usual stipulation.

Mr. Katz: Usual stipulation.

The Court: Mr. Ormont was on the stand.

SAM ORMONT

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Strong:

Q. Now as to Defendant's Exhibit MM, which is a check to Benjamin Kosdon for \$750 which you testified was from your personal account, do you know where that particular \$750 came from?

A. From my personal checking account.

(Testimony of Sam Ormont.)

Q. But you don't know where that sum itself originally came from into your account, do you?

A. From the account only, is all I know.

Q. In other words, you can't trace it further than the account? A. No.

Q. Now as to Defendant's Exhibit O, which is a check for \$206.11, that is a check from the Acme Meat Company [1274] account, is that right?

A. Yes, it is.

Q. And it is payable to you personally?

A. Correct.

Q. And you were the one who was the Acme Meat Company at that time?

A. What do you mean?

Q. I mean the Acme Meat Company was the name under which you were operating.

A. Not as a sole owner.

Q. You and Mr. Salter? A. Correct.

Q. Do you know what was done with that check of \$206.11?

A. I believe it was deposited.

Q. To your personal account?

A. To one of the personal accounts?

Q. You don't know the source of that money, the \$206.11, other than it came from the Acme Meat Company account?

A. That is correct.

Q. As to Defendant's Exhibit T, which was a series of checks which I understood you testified was used to pay for livestock purchases?

A. Yes.

(Testimony of Sam Ormont.)

Q. You didn't buy any bonds with any of these funds represented by those checks, did you?

A. Not by [1275] those checks; no.

Q. As to Defendant's Exhibit R, which is a check for \$8147.73, did I understand that that was used to purchase bonds?

A. Yes, it was.

Q. Which bonds?

A. This was the \$10,000 series.

Q. Do you know which particular bond it was?

A. It was several \$1000 bonds.

Q. And that money came from your personal account?

A. Yes.

Q. Do you know where its origin was originally before it got into your personal account?

A. All I know is that it came from the personal checking account.

Q. Your checking account?

A. Yes.

Q. But you can't say where that \$8147.73 came from?

A. From my personal checking account.

Q. But to get into it, can you say where it came from?

A. I don't recollect.

Q. As to this check which is Defendant's Exhibit S, which is drawn on the Acme Meat Company account signed by you, payable to you, that is for \$1332.27, that was used to buy a [1276] bond, is that right?

A. That was used in the purchase of bonds; yes.

Q. Which bonds?

A. The \$10,000 item.

Q. Still the \$10,000 item?

A. Yes.

Q. Can you designate with any more specificity which of those bonds it was?

(Testimony of Sam Ormont.)

A. I can't recollect the serial numbers; no.

Q. Do you know where this money came from originally before it got into the Acme Meat Company account?

A. No, I wouldn't know.

Q. This Defendant's Exhibit Z, which is a check for \$595.25, which is drawn by you on your personal account and payable to you, I understand that you bought bonds with that too.

A. Yes, I did.

Q. Which ones?

A. That was the \$7000 transaction.

Q. Where did that \$595.25 come from originally?

A. From my personal checking account.

Q. But before it got into there, do you know where it came from?

A. I don't know.

Q. In fact, wouldn't that be your answer to all of [1277] these checks?

A. Well, some particular ones I could identify but not these particular ones.

Q. How about this Defendant's Exhibit AA, which are checks drawn on the Acme Meat Company account signed by you and payable to you, each for \$100, was that used to buy bonds?

A. Yes.

Q. You wouldn't know as to where the money originally came from?

A. These moneys came from the Acme Meat Company.

Q. But the source from which the Acme Meat Company got them, would you know that?

A. No, I wouldn't.

(Testimony of Sam Ormont.)

Q. Now, you have been shown various checks here by Mr. Robnett which you testified to were used to purchase bonds. Were there any other checks used by you to purchase bonds which were not shown to you by Mr. Robnett?

Mr. Robnett: Object to that as not cross-examination.

The Court: Objection sustained. [1278]

Q. Defendant's Exhibit V, which is the check for \$5000, drawn on the Acme Meat Company account, signed by you, payable to you, which I understood by you to purchase bonds or a bond?

A. Yes.

Q. Can you state where that money originally came from before it got into the Acme Meat Company account?

A. I wouldn't know.

Q. And the \$204.75, which is the check by the United Dressed Beef Company, payable to you, was that used to buy a bond? A. Yes, it was.

Q. Which bond?

A. That was in the \$7,000 transaction.

Q. Without going into all the other checks, I want to ask you this: You testified that you kept a large amount of cash on hand, because you did not want to put it into banks, is that right?

A. I would not say that.

Q. Well, you were asked by Mr. Robnett:

"Q. Mr. Ormont, as to your habit of keeping some of your funds in currency, will you state to the Court and jury what your reason was for so doing?

(Testimony of Sam Ormont.)

Your answer was:

“A. Well, when I first started, my mother had a [1279] very unfortunate experience in her early days in Los Angeles. She lost quite a bit of her savings in a couple of small bank failures, and she always advised me never to keep all my eggs in one basket.”

That was the reason you gave then?

A. Yes. Did you say all of the funds originally in the question?

Q. That's right.

A. That is incorrect.

Q. Isn't true that you made very substantial deposits in your personal bank account during the years 1937, 1938, 1939, 1940, 1941 and 1942?

Mr. Robnett: I object to that as not cross-examination.

The Court: Overruled.

A. Yes.

Q. (By Mr. Strong): And you testified about how much money you had; as I understood, it was between eleven and twelve thousand dollars in cash which you had at the end of 1941. Can you state approximately when you accumulated that money?

A. In how many years' time?

Q. Yes.

A. I would say it was close to 14 years.

Q. Let us take the year 1941. How much would you say you accumulated out of that \$12,000 during 1941? [1280]

(Testimony of Sam Ormont.)

A. I would not know definitely.

Q. Roughly? A. I couldn't say.

Q. Not even by thousands or hundreds?

A. No.

Q. Can you say as to any one of the preceding years?

A. I would say it amounted from \$700 to \$1,000 a year.

Q. That was from your earnings?

A. That was from my earnings.

Q. And the balance of your earnings you deposited to your personal account?

A. Not necessarily.

Q. Would you deposit any of the balance of your earnings to your personal account?

A. Yes, some of them.

Q. How much would you say your income was in 1941?

Mr. *Ormont*: I object to that as not cross-examination.

The Court: Overruled.

A. I couldn't tell you exactly, without looking at the returns.

Mr. Strong: May I have this marked for identification, your Honor?

The Court: 57.

(The document referred to was marked Government's Exhibit 57 for identification.)

Q. (By Mr. Strong): Would [1281] your answer be the same as to 1940, 1939, 1938 and 1937?

(Testimony of Sam Ormont.)

Mr. Robnett: Same objection, your Honor please; not cross-examination.

The Court: This is admissible only for testing the credibility of the witness in connection with the one phase of his direct examination as to the amount of cash he had on hand.

Mr. Strong: That is what I am doing.

The Court: And for no other purpose?

Mr. Strong: Yes.

The Clerk: Exhibits 57 to 61, inclusive, marked for identification.

(The documents referred to were marked Government's Exhibits 58, 59, 60, 61, for identification.)

(Showing same to counsel.)

Mr. Strong: May we have permission to substitute photostats for these as soon as possible, as they are the original records of the Internal Revenue?

The Court: Surely, provided they are the same size as the originals, and not reduced; not so small you can't read them.

Mr. Strong: Black and white?

The Court: Black and white. [1282]

Q. (By Mr. Strong): These sums from \$700 to \$1,000, which you said you accumulated during 1941, and during each of the preceding years, they came from your earnings, is that correct?

A. Correct.

(Testimony of Sam Ormont.)

Q. Did you have any other source of income?

A. Not from my earnings; outside of my earnings.

Q. That money that you accumulated in cash was from your earnings, is that right?

A. Correct?

Q. I understand that amount of money that you said you accumulated in cash each of the years——

A. Was from earnings.

Q. Your earnings? A. Yes.

Q. You had no other source of income during those years? A. No.

Q. I show you Government's Exhibit 57 for identification, which is an income tax return, and simply ask you to refresh your recollection as to what your income was for the year 1941.

Mr. Robnett: Same objection.

The Court: Same ruling. Objection overruled.

The Witness: What is it you want?

Q. (By Mr. Strong): What was your income for that year? A. \$9068.25.

Q. I show you Government's Exhibit 61 for identification, which, I believe, is the original of your income tax return for the year 1940. Will you use that to refresh your recollection, and then state how much your income was during the year 1940?

A. \$7,499.49. [1284]

Q. Then I show you Government's Exhibit No. 60 for identification, which I believe is your original income tax return for the year 1939, and would you

(Testimony of Sam Ormont.)

refresh your recollection from that and state how much your income was during 1939?

A. \$9111.96.

Q. I show you Government's Exhibit 59 for identification and ask you to please state from that, which I believe is your original income tax return for the year 1938, how much your income during the year 1938 was.

A. \$6344.50.

Q. And finally I show you Government's Exhibit 58 for identification, which I believe is your income tax return for the year 1937, and will you refresh your recollection as to how much your income was for that year?

A. \$7381.33.

Q. Thank you. And it is from that income that you testified, I believe, that you took out the cash amounts, is that right?

A. Not all of it from those particular years.

Q. Well, you said from \$700 to \$1000 a year.

A. In those particular years you are talking about, yes.

Q. Now I ask you whether it isn't true that in the year 1942 you deposited to your personal account a sum in excess of \$24,000. [1285]

A. I beg your pardon?

Mr. Robnett: Object to that as not proper cross-examination.

Mr. Strong: He bought his bonds in '42 and '43.

The Court: Let me hear the question.

(The question referred to was read by the reporter as follows:

(Testimony of Sam Ormont.)

(“Q. Now I ask you whether it isn’t true that in the year 1942 you deposited to your personal account a sum in excess of \$24,000.”)

The Court: Objection sustained.

Mr. Strong: Is that as to the year?

The Court: Objection sustained.

Mr. Strong: Then I will have to ask other questions.

Q. I ask you whether it isn’t true that during the year 1941 you deposited to your personal accounts a sum in excess of \$21,000.

Mr. Robnett: Object to that as not proper cross-examination.

The Court: Objection sustained. The subject matter was not touched by the direct examination.

Mr. Strong: It goes to the credibility of the witness. The witness testified he saved cash and I think I can show to the contrary.

The Court: Objection sustained. [1286]

Mr. Strong: As to all the years I will ask, I assume?

The Court: As to the subject matter. The subject matter was not covered so if you ask the same question as to each year it would be sustained if the same objection were made.

Mr. Robnett: I assign counsel’s statement as prejudicial, your Honor.

The Court: The statement as to what he wanted to show?

Mr. Robnett: Yes.

(Testimony of Sam Ormont.)

The Court: The jury will be instructed to disregard the remarks of counsel.

Mr. Strong: No further questions.

The Court: Redirect?

Mr. Robnett: No redirect.

The Court: Cross-examination, Mr. Katz?

Mr. Katz: No questions, your Honor.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Robnett: Mr. Paul Kane, please.

PAUL KANE

called as a witness by and in behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name? [1287]

The Witness: Paul Kane.

The Clerk: Your address?

The Witness: 1417 South Crescent Heights Boulevard.

The Clerk: Beverly Hills?

The Witness: No, Los Angeles.

The Clerk: Take the stand.

Direct Examination

By Mr. Robnett:

Q. Mr. Kane, are you acquainted with Sam Ormont, the defendant in this action, who was just on the witness stand? A. I am.

(Testimony of Paul Kane.)

Q. And were you so acquainted with him in the year 1937? A. I was, sir.

Q. I will ask you if you had any transaction with Mr. Ormont during the year 1937.

A. I did.

Q. With regard to borrowing of money from him? A. Yes, sir.

Q. Did you or did you not borrow any money from Mr. Ormont that year? A. I did, sir.

Q. How much did you borrow? A. \$500.

Q. I will ask you if you have repaid that money.

A. I have, sir.

Q. What year did you repay it? A. '42.

Q. 1942? A. Yes, sir.

Q. In what manner did you repay it, that is to say, did you use checks or currency?

A. No, I paid him in cash.

Q. In cash? A. Yes.

Q. And did you make it all in one payment or in installments? A. In installments.

Q. How much? A. \$50 a month.

Mr. Robnett: Cross-examine.

Cross-Examination

By Mr. Strong:

Q. I ask you, Mr. Kane, whether you know how, if at all, that sum of money which you repaid was entered on the books of the Acme Meat Company.

A. I really couldn't tell you.

Mr. Robnett: Object to that as improper cross-examination, asking for an opinion of the witness.

The Court: Objection sustained. [1289]

(Testimony of Paul Kane.)

Q. (By Mr. Strong): I ask you to look at Government's Exhibit 1, which is an income tax return of the defendant Sam Ormont for 1942, and state whether you find any place upon that reported the sum of \$500 which you said you repaid during that year.

Mr. Robnett: I object to that as not cross-examination.

The Court: Objection sustained.

Mr. Strong: I will make him my direct witness, your Honor.

The Court: You cannot do it now. You have closed your case.

Mr. Strong: With reference to cross-examination, I may not?

The Court: No.

Mr. Strong: No further questions.

The Court: You can do it if you want to on rebuttal but not at this stage of the proceedings.

Mr. Strong: No further questions.

Mr. Robnett: That is all. And the witness may be excused.

Mr. Strong: I would like to have him remain, your Honor.

The Witness: I have to go back.

The Court: He says he has to go to work.

The Witness: I have a place of business and I had to leave somebody to watch it. [1290]

Mr. Strong: May I ask him out of turn then?

The Court: No, I do not think so.

(Testimony of Paul Kane.)

Mr. Strong: I will arrange to call him by phone if I may have his telephone number so as to not inconvenience him.

The Court: Will you give Mr. Strong your telephone number?

Mr. Strong: How long will it take you to get back?

The Witness: I can't answer that.

The Court: You got here this time.

The Witness: I can close the doors.

The Court: The order of court will be that either you remain until Mr. Strong calls you or that you return upon call.

The Witness: I better remain because I have someone there now, sir.

Mr. Robnett: He says he will remain.

The Court: You may have to remain all day today and tomorrow. I don't know when the defendants will finish their case.

Mr. Strong: I will take a chance and let him go back to his business and then I will try to get him myself.

The Court: Very well.

(Witness excused.)

The Court: Next witness.

Mr. Robnett: Mrs. Mary Reardon. [1291]

MRS. MARY REARDON

called as a witness by and in behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Mrs. Mary Reardon; R-e-a-r-d-o-n.

The Clerk: Your address?

The Witness: 758 South Ardmore.

The Clerk: Take the stand.

Direct Examination

By Mr. Robnett:

Q. Mrs. Reardon, in order that all the jurors may hear, will you raise your voice as best you can?

A. Yes, I will.

Q. Are you acquainted with Samuel Ormont, the defendant in this action? A. I am.

Q. About how long have you known him?

A. Since about 1942, in July.

Q. By the way, what is your business, please?

A. I am secretary and treasurer of the Los Angeles Livestock Exchange.

Q. And in connection with that business have you had occasion to have dealings with Mr. Ormont?

A. I have. [1292]

Q. And do you know of others, acquainted with others who have had dealings with him?

A. Yes, I am.

Q. Do you know the reputation of Mr. Ormont for truth, honesty, integrity and fair dealing in

(Testimony of Mrs. Mary Reardon.)

the community where he transacts business or in the community where he resides, either place?

A. My office acts as a clearing house——

The Court: No, no.

Mr. Robnett: Do you know his reputation?

The Court: Do you know his reputation, either in the community where he transacts business or where he lives?

The Witness: As far as I know, in my office——

The Court: Just answer that one yes or no. Do you know his reputation for truth, honesty and integrity?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Robnett): What is it, good or bad? A. It is good.

A. It is good.

Mr. Robnett: Thank you. You may cross-examine.

Cross-Examination

By Mr. Strong:

Q. Just one question: Do you know anything about Mr. Ormont's income tax return? [1293]

A. I do not.

Mr. Strong: That is all. Thank you.

The Court: You may be excused.

(Witness excused.)

Mr. Robnett: We would like to call Mr. Haimer.

HIGH HAIMER

called as a witness by and in behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: High Haimer.

The Clerk: Your address?

The Witness: 5214 Ruth Ellen.

The Clerk: Take the stand.

Direct Examination

By Mr. Robnett:

Q. Mr. Haimer, what is your business?

A. Grocery business.

Q. Are you acquainted with Samuel Ormont, the defendant in this action? A. Yes, I am.

Q. How long have you known him?

A. About 20 years.

Q. Have you had any dealings with him?

A. Well, mostly of a personal account, I mean as a [1294] friend.

Q. Mr. Haimer, are you acquainted with other persons who have been acquainted with Mr. Ormont? A. I am.

Q. Do you know Mr. Ormont's reputation for truth, honesty, integrity and fair dealing in the community in which he resides or in the community in which he transacts business?

A. It has always been very favorable.

Mr. Robnett: You may cross-examine.

(Testimony of High Haimer.)

Cross-Examination

By Mr. Strong:

Q. Do you know anything about his income tax during the year 1944?

Mr. Robnett: I object to that as not proper cross-examination.

The Court: Objection sustained.

Mr. Strong: No questions.

The Court: Next witness.

(Witness excused.)

Mr Robnett: Mr. Jeal.

ALBERT JEAL

called as a witness by and in behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows: [1295]

The Clerk: Will you please state your name?

The Witness: Albert H. Jeal; J-e-a-l.

The Clerk: Your address?

The Witness: 4808 Victoria Avenue.

The Clerk: Los Angeles?

The Witness: Yes.

The Clerk: Take the stand.

Direct Examination

By Mr. Robnett:

Q. Mr. Jeal, what is your business?

A. I am junior vice president and manager of the Citizens National Trust and Savings Bank, the Los Angeles Union Stockyards.

(Testimony of Albert H. Jeal.)

Q. How long have you been engaged in such business?

A. Well, I have been there for the past 11 years.

Q. Are you acquainted with Samuel Ormont, the defendant in this action? A. I am.

Q. How long have you known him?

A. For the past 10 or 11 years.

Q. Have you transacted any business with him?

A. Yes, I have.

Q. Do you know others who know Mr. Ormont?

A. I do.

Q. I will ask you if you know Mr. Ormont's reputation for honesty, truth, integrity and fair dealing either in the [1296] community in which he resides or the community in which he transacts business.

A. Very good in the community in which he transacts his business.

Mr. Robnett: Thank you. Cross-examine.

Cross-Examination

By Mr. Strong:

Q. Are you acquainted with the charges in this case?

Mr. Robnett: I will object to that, your Honor.

The Court: This witness was up here once before.

Mr. Strong: He did look familiar.

The Witness: You called me, Mr. Strong?

Mr. Robnett: I submit that it is not proper cross-examination.

(Testimony of Albert H. Jeal.)

The Court: The objection is sustained; not proper cross-examination.

Mr. Strong: No questions.

(Witness excused.)

The Court: Next witness.

Mr. Robnett: Mr. Campton, please.

BENJAMIN W. CAMPTON

called as witness by and in behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name? [1297]

The Witness: Benjamin W. Campton; C-a-m-p-t-o-n.

The Clerk: Your address, Mr. Campton?

The Witness: 3399 East Vernon Avenue.

The Clerk: Take the stand, please.

Direct Examination

By Mr. Robnett:

Q. What is your business, Mr. Campton?

A. I am president and executive secretary of Meat Packers, Inc., a trade association.

Q. And you have been such for some time, have you?

A. For the past nine years; yes, sir.

Q. Are you acquainted with Samuel Ormont, the defendant in this action?

A. I am. [1298]

(Testimony of Benjamin W. Campton.)

Q. How long have you known him?

A. Well, in excess of 10 years.

Q. Are you acquainted with other persons who know Mr. Sam Ormont? A. I am.

Q. I will ask you if you know Mr. Ormont's reputation for truth, honesty, integrity, and fair dealings, in the community in which he transacts business, and in the community in which he resides?

A. In business affairs I do; they are very good.

Mr. Robnett: Thank you. You may cross-examine.

Mr. Strong: No questions.

The Court: You may be excused.

(Witness excused.)

A. R. PHILLIPS

a witness called by and on behalf of the defendant Ormont, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

A. A. R. Phillips.

The Clerk: Your address, Mr. Phillips?

A. 111 West Seventh Street.

Direct Examination

By Mr. Robnett:

Q. Mr. Phillips, what is your business?

A. Insurance broker. [1299]

Q. You have been a resident of Los Angeles County, have you, for a number of years?

A. About 30.

(Testimony of A. R. Phillips.)

Q. Are you acquainted with Samuel Ormont, one of the defendants in this action? A. Yes, sir.

Q. How long have you known him?

A. Approximately 10 years.

Q. Have you had any business dealings with him? A. Yes, sir.

Q. Do you know others who are acquainted with Mr. Ormont? A. Yes, sir.

Q. I will ask you if you know Mr. Ormont's reputation for truth, honesty, integrity and fair dealings in the community in which he transacts business and in the community in which he resides?

A. I do.

Q. Is it good or bad? A. Excellent.

Mr. Robnett: Thank you. You may cross-examine.

Cross-Examination

By Mr. Strong:

Q. You have dealings in insurance with Mr. Ormont? A. Pardon?

Q. You have dealings with reference to insurance with [1300] reference to Mr. Ormont?

A. Yes, sir.

Q. Do you sell him insurance?

A. He buys some insurance from me.

Mr. Strong: Thank you.

The Court: You may be excused.

(Witness excused.)

CHARLES J. LUMPP

a witness called by and on behalf of the defendant Ormont, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Charles J. Lumpp.

The Clerk: What is your address?

The Witness: 2822 Cudahy Street, Walnut Park.

Direct Examination

By Mr. Robnett:

Q. Mr. Lumpp, what is your business?

A. I am vice president and general manager of the Los Angeles Union Stock Yard Company?

Q. You have been such for a number of years, have you?

A. I have been in that position since 1942.

Q. Prior to that you were connected with them?

A. Yes, sir, I have been with them for 25 years.

Q. Are you acquainted with Samuel Ormont?

A. I am. [1301]

Q. How long have you known him?

A. In excess of five years.

Q. Have you had any dealings with Mr. Ormont?

A. Not directly, no, sir.

Q. Are you acquainted with other people who do know Mr. Ormont? A. I am.

Q. Do you know his reputation for honesty, truth, integrity and fair dealing in the community in which he transacts business, or in the community in which he resides?

(Testimony of Charles J. Lumpp.)

A. In the community in which he transacts business, I do.

Q. Is it good or bad? A. It's good.

Mr. Robnett: Thank you. You may cross-examine.

Cross-Examination

By Mr. Strong:

Q. That business is the meat business?

A. Livestock.

Q. Your business is that of livestock?

A. Yes.

Q. Buying and selling?

A. No, we run a hotel for livestock; operate a hotel for livestock.

Q. For livestock or people? [1302]

A. For livestock.

The Court: When you check them out they are dead?

The Witness: No, sir, they are alive, Judge. Most people don't know what a stockyard is, and that is why I called it a hotel for livestock. All we do is feed, water, weigh, including loading and unloading of livestock.

The Court: That includes Mr. Ormont's livestock?

The Witness: Livestock he purchased in the stockyards.

Q. (By Mr. Strong): Just what is the nature of your dealing with Mr. Ormont?

A. All during the period I have known him.

(Testimony of Charles J. Lumpp.)

Q. Do you mean he would bring livestock in?

A. No, sir, he purchased at the yard.

Q. Then he paid for it?

A. Paid for it through the Los Angeles Live-stock Exchange. We performed the services of loading it out.

Q. Those are the only transactions you had with Mr. Ormont? A. Yes.

Mr. Strong: That is all.

Mr. Robnett: Is he excused?

The Court: Yes, the witness may be excused.

(Witness excused.) [1303]

JOSEPH SMITH, JR.

a witness called by and on behalf of the defendant Ormont, being first duly sworn, was examined and testified as follows:

The Clerk: May I have your name?

The Witness: Joseph P. Smith, Jr.

The Clerk: Your address?

The Witness: 16121 California Avenue, Santa Monica.

Direct Examination

By Mr. Robnett:

Q. Mr. Smith, what is your business?

A. I am a cattle dealer.

Q. Have you been such for a number of years?

A. Yes.

Q. Are you acquainted with Mr. Samuel Ormont, the defendant? A. I am.

Q. How long have you known him?

A. Three years.

Q. Do you know others who know Mr. Ormont?

A. Yes.

Q. I will ask you if you know Mr. Ormont's reputation in the community in which he transacts business for truth, honesty, integrity and fair dealing?

A. Yes, sir, it is very good.

Mr. Robnett: Thank you. You may cross-examine. [1304]

Mr. Strong: No questions.

The Court: You may be excused.

(Witness excused.)

D. H. LILLYWHITE

a witness called by and on behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: D. H. Lillywhite.

The Clerk: Your address?

The Witness: 3609 West Vernon Avenue.

Direct Examination

By Mr. Robnett:

Q. Mr. Lillywhite, what is your business or occupation?

A. I am in the livestock commission business.

Q. Do you have a company?

A. D. H. Lillywhite Company.

(Testimony of D. H. Lillywhite.)

Q. Do you hold any official position in that company? A. I am the proprietor.

Q. How long have you been in that business?

A. Since 1921.

Q. Are you acquainted with Mr. Samuel Ormont? A. Yes.

Q. How long have you known him?

A. I have known him about 25 years. [1305]

Q. Do you know Mr. Ormont's reputation as to truth, honesty, integrity and fair dealing in the community in which he transacts business?

A. I do.

Q. State whether it is good or bad?

A. It's good.

Mr. Robnett: Thank you. You may cross-examine.

Cross-Examination

By Mr. Strong:

Q. When did you last discuss with anyone Mr. Ormont's reputation?

A. I beg your pardon?

Q. When did you last discuss with anyone Mr. Ormont's reputation?

A. I have not discussed it with anyone.

Q. Not at all? A. Not at all.

Q. Never? A. No.

Q. How do you know what it is?

A. Because he has been around me there about that length of time.

Q. Around you? A. Yes.

(Testimony of D. H. Lillywhite.)

Q. Then I understand you are testifying to what your [1306] opinion is of Mr. Ormont; not his reputation?

A. My opinion of his reputation.

Q. You have no other opinion but your own?

A. After 25 years, I think I would know pretty well.

Q. You haven't talked with anybody else about it?

A. I wouldn't have to. I have had personal dealings with him.

Mr. Strong: That is all.

The Court: You will be excused.

(Witness excused.)

JULIUS SCHWARZSCHILD

a witness called by and on behalf of the defendant Ormont, being first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Julius Schwarzschild.

The Clerk: Your address, Mr. Schwarzschild?

The Witness: Residence?

The Clerk: Yes.

The Witness: 2505 West Sixth Street.

Direct Examination

By Mr. Robnett:

Q. What is your business or occupation, Mr. Schwarzschild?

A. Manager of Bissinger & Company.

(Testimony of Julius Schwarzschild.)

Q. What business are they engaged in?

A. Handling hides, skins, and tallow. [1307]

Q. How long have you been manager of that company?

A. I have been with the firm about 47 years.

Q. Are you acquainted with Mr. Samuel Ormont, one of the defendants?

A. Yes, I do know him.

Q. How long have you known him?

A. I would say about 15 years.

Q. Do you know others who know Mr. Ormont?

A. Yes.

Q. Do you know other people who are acquainted with him? A. Oh, yes, sir.

Q. I will ask you if you know Mr. Ormont's reputation for truth, honesty and integrity and fair dealing in the community in which he transacts business?

A. I have never had any reason to question it. I have done a lot of business with him, and he always was open and above board.

Q. I do not understand.

The Court: He said: I never had any reason to question it. I have done a lot of business with him, and it was always open and above board. He hasn't answered your question.

Mr. Robnett: No. Do you know his general reputation in the community in which he transacts business for truth, honesty and integrity and fair dealings? A. Good. [1308]

Mr. Robnett: Thank you.

(Testimony of Julius Schwarzschild.)

Cross-Examination

By Mr. Strong:

Q. When did you last discuss his reputation with someone?

A. I did not discuss it. I haven't discussed it at all, because I was away on a vacation, and did not even know the trial was going on until they called me to come up here.

Q. Before vacation?

A. I did not have to. I have had business dealings. I met people who know him, and I did not have any special discussion.

Q. You never had any special discussion?

A. No.

Q. What you are giving us is your opinion of Mr. Ormont; not his reputation in the community?

A. And I know other people who have had business with him, too.

Q. You haven't discussed it with him, have you?

A. No, not discussed it.

The Court: Did you ever ask them about it; what they thought of him, or did they ever tell you what they thought of him?

The Witness: No. I have known Mr. Ormont. I have had business dealings with him. I did it because I knew other people, and I have talked with them, and knew it was a safe [1309] account. I knew other people doing business with him before I did. Then he did his, and I haven't had any doubt about it.

(Testimony of Julius Schwarzschild.)

Q. You don't know his reputation in the community, but just so far as you are concerned?

A. My transactions have been with him.

Q. Do you still feel that is his reputation?

A. I am still doing business with him.

Q. In deciding what you think of him, did you take into account the facts in this case?

Mr. Robnett: I object to that.

A. I don't know. I never heard of the case.

The Court: Just a minute.

Mr. Robnett: I object upon the ground that it is not proper cross-examination.

The Court: The objection is sustained.

Mr. Strong: That is all.

Mr. Robnett: Thank you. If the Court please, the defendant Sam Ormont rests.

The Court: Any rebuttal?

Mr. Strong: Recess? I will go through my papers. I will see if there will be any. I will try to shorten it, if there is any.

The Court: We will have a short recess while Mr. Strong looks through his papers.

(Short recess.) [1310]

The Court: Usual stipulation?

Mr. Strong: Yes, your Honor.

Mr. Robnett: So stipulated.

Mr. Katz: Yes, your Honor.

The Court: Is there any rebuttal?

Mr. Strong: The Government rests as to both defendants.

The Court: The Government rests, and the defendants rest.

The matter of the argument will not proceed until after I have had an opportunity to consult with counsel concerning instructions, so that in their argument to the jury they may know what instructions I will give on the law.

If you have all of your instructions ready——

Mr. Robnett: We are trying to get them ready, your Honor.

The Court: Very well.

Mr. Robnett: We will have them in a few moments.

Mr. Strong: May the record show I have given a copy to each of defense counsel of my instructions and two copies to your Honor, the original and a copy?

The Court: Very well.

That being the case there will be no further need of the jury this afternoon pending the conference. I doubt if we can proceed with the conference probably until tomorrow morning in order that each side may have an opportunity to examine [1311] the instructions submitted by the other, so that you may formulate your notions concerning them. For that reason the jury will be excused until 10:00 o'clock tomorrow morning. Remember the admonition.

(The jury retired from the courtroom at 3:20 o'clock p.m.)

(The following proceedings were had outside the presence of the jury.)

The Court: Now I notice in the instructions that were handed up to me by both defendants that there were general instructions. I have a set of general instructions about the weight of the evidence and what a presumption is and an inference and a definition of reasonable doubt, and so forth, so you might save time—these are two different cases in which I gave them—but I will give each one of you a copy. I think you are familiar with them, Mr. Strong.

Mr. Strong: Yes, your Honor.

The Court: Will you wish a copy?

Mr. Strong: No, your Honor.

The Court: Very well. The defendants may have this copy.

Mr. Kosdon: Thank you, your Honor.

The Court: How soon can you get your instructions to me? Can you get them to me this afternoon so that I can be looking at them?

Mr. Robnett: We will try to, your Honor.

Mr. Katz: Your Honor please, I have some instructions that I find it necessary to redraw because of the granting of one of the motions that was made yesterday—I should say the granting in part of one of the motions made yesterday—and I would like to have an opportunity to do that this evening and submit my instructions complete to your Honor tomorrow morning. I handed them in fairly early and I thought they were in complete shape except for such additional instructions that I might have later.

The Court: If you can bring them in at 9:00 o'clock.

Mr. Katz: Yes.

The Court: Do you wish a copy for your office of these same general instructions?

Mr. Katz: I would appreciate it.

The Court: Very well. You will return them to me. They all follow the same general idea.

Very well. The court will recess until 9:00 o'clock tomorrow morning. The conference will be in chambers where we can be more informal than otherwise. And it will be necessary for the defendants to be present.

Mr. Strong: Your Honor, before your Honor recesses, I have marked for identification certain original income tax returns which are marked as Government's Exhibits 57, 58, 59, 60 and 61 for identification. They were the ones that were used in connection with the witness Ormont. May I at this time withdraw these so that I may return them to the Internal Revenue Bureau?

The Court: They may be withdrawn.

Mr. Robnett: Your Honor, I will want to renew motions that I made at the close of the Government's case. [1314]

The Court: I think now would be an appropriate time to do that.

Mr. Katz: If the Court please, at this time I move the Court for an acquittal of the defendant Himmelfarb under Count 2 of the indictment, which is the only count which attempts to state an offense against the defendant.

In making this motion I wish preliminarily to make the observation, if the Court please, that it is

my thought that in any case where there is any doubt in the mind of the Court that such doubt should be resolved in favor of the defendant, but in this case particularly I think that principle should be applied because I don't believe that there is any question in the mind of your Honor—I know that there isn't in mine—that the very nature of this case is such that it must of necessity lend itself and result in confusion in the deliberations of this jury on the question of guilt or innocence of these defendants, and I say that for this reason, if your Honor please, I believe it is true that those who are trained and experienced in the field of law find it very difficult to segregate evidence that has been admitted against one defendant only from the evidence admitted against the other and in such deliberations to weigh the evidence and determine it solely upon the evidence admitted as against one defendant and against that defendant alone, where all the evidence came [1315] in during the course of the same case and same trial, and part of it, by far the more substantial part, came in as against one defendant.

Now with that preliminary observation, if the Court please, I proceed, and if I may take the time to do so, I regard this motion as a very important step in this proceeding. I am not making it merely as one of the rights available to a defendant merely to preserve a record; I make this motion in all sincerity because I believe in the motion I am making. I believe that that motion is well taken.

I have gone over the transcript in this case, if the Court please, to determine for myself just exactly what there is in the way of evidence that has come into this case as against the defendant Himmelfarb, and I find that we have Exhibit No. 4, which is an income tax return of the defendant Himmelfarb for the year 1944, and Exhibit No. 5, income tax return of Ruth Himmelfarb for the year 1944, without any testimony relative to those exhibits at all.

We have Exhibit No. 6, which is a joint venture return for the fiscal year of May 1, 1944 to April 30, 1945 and no testimony with respect to that exhibit except Exhibit No. 6 was signed by the defendants and that the division of the profits that was shown in there was made pursuant to the direction of the defendants.

Now we find that the first witness in this case was Albert D. Allen, and he took the stand and was excused. That was the man that came down from the tax record office who didn't have a truck large enough to bring the records down and stipulations took care of the amounts that would have been paid on the returns and stipulated to as to the returns. Consequently there was no testimony from him. [1317]

The next witness was Mr. Baizer, who identified records respecting Mr. Ormont only.

The next witness was James E. McClung, who identified records of Mr. Ormont only.

The third witness in the case—I am eliminating Mr. Allen, if the Court please—No. 3 was Mr. Jehl, who identified bank records of Mr. Ormont only.

The next witness was Mr. Thomas Miller, the fourth witness in the case, from Merrill Lynch, Pierce, Fenner & Beane, who identified, which he prepared and testified to, Ormont's records only.

The next witness was Mr. Pingree, the fifth witness in the case, who only identified the bank records of the First and Chicago Branch, of the defendant Himmelfarb.

At that point we have Exhibits Nos. 32, 33, 34, 35 and 36, which came into evidence based merely upon the identification of them. Those were bank records, without any testimony at that time, or subsequently, with respect to the matter contained thereon.

The sixth witness in this case, if the Court please, was Mr. Link. His testimony was exclusively directed toward the defendant Ormont, save and except,—and this is the testimony as I have read it, directed against Mr. Himmelfarb, that he saw the defendant Himmelfarb perform work in the premises of the Acme Meat Company during 1944 and 1945; that he saw him [1318] make out invoices to customers; that he would compute the amount due to a customer. He saw him make another computation on the list which he kept in the drawer; saw him sell beef, and other meat cuts; make audits, payroll checks, and checked against the books, but Mr. Link never saw him receive any money in connection with the list referred to.

The list contained customers and accounts, sometimes in the handwriting of Mr. Himmelfarb, and sometimes in the writing of Mr. Ormont. The profits of the Acme Meat Company for 1944 were

credited against Sam Ormont. That is the sole testimony of Mr. Link, and that, with the one exception, is the sole testimony in this case.

Mr. Eustice was the next witness. His testimony was directed exclusively against Mr. Ormont. Mr. Eustice went with us a long time, and I think has the distinction of being the major witness with the prosecution.

The next witness was Mr. Gorgerty, who testified in respect to insurance policies, and monthly reports that the witness made and signed.

The next witness in the case, which was the next one in order, was Mr. Phoebus. His testimony was directed against Mr. Ormont only.

The next witness was a Mr. Smith, whose testimony commenced with respect to Ormont only, and the stipulation by Mr. Ormont, with the prosecution, eliminated further testimony. [1319]

Then we have Mr. William Malin, whose testimony, insofar as it concerned the defendant Phillip Himmelfarb, was that he sent Exhibits 50-A and B to Mr. Bircher. Those are the affidavits and the letter, and that the information in those exhibits was obtained by Mr. Malin from Mr. Himmelfarb. That he mailed and prepared Exhibit 6, and that the information on the return came in part from others, and the items showing the divisions came from the defendants, and that Exhibit 6 was signed by the defendant Himmelfarb.

That, if the Court please, is the total of the evidence before this Court.

Now, it is quite obvious that, insofar as the testimony is concerned, there is no testimony that the defendants in this case earned any sum of money in excess of what was reported, and there is no indication of any amount he earned in excess, if we assume there was an excess, that there was any attempt to evade income taxes, whether there were any income taxes unpaid.

Consequently, we are limited, if the Court please, to the exhibits, as the silent, inanimate objects that they are and what can be gleaned therefrom, without any testimony to help, insofar as the determination is concerned, and establishing a criminal offense against the defendants.

With respect to the returns for the year 1944, of the defendants, they merely show the amount that he reported as [1320] income, and the deduction he has taken, and the tax that he has paid. That, in and of itself, does not establish any additional income, or any attempt to evade.

We turn then to Exhibit 6, if the Court please. That Exhibit 6 shows a joint venture. There isn't any testimony with respect to Exhibit 6 as against this defendant other than what I have called your attention to, which neither adds to, nor detracts from the exhibit in any way. That exhibit merely shows an income over a period from May 1st, 1944 to April 30, 1945.

It was my thought yesterday, and previously—it is still my thought today; it is not the Court's, I know—that that report of income for the period of May 1st, 1944 to April 30, 1945, does not in and of

itself establish that any part of that was earned in 1944. It might have been, but in order to arrive at the might have been, we must indulge in an inference and an assumption, and I don't believe inferences or assumptions, in and of themselves, are sufficient, if the Court please, to establish a criminal case, where the evidence is required to be beyond a reasonable doubt.

Assuming now, for the purpose of this discussion, that it does establish that part of the income for the period May 1st, 1944 to April 30, 1945, was earned in a part of April, there is nothing in the way of evidence, as against this defendant, that in any way establishes that there wasn't a joint venture; [1321] that there wasn't a fiscal period; that it wasn't properly reported, or that should have been reported in any other fashion than it was.

And even if we assume that we can from Exhibit 6 engage in another assumption and another inference, and base an assumption upon an assumption and an inference upon an inference, that part of it should have been, there is nothing before this Court that in any way indicates, so far as the defendant Himmelfarb is concerned, that there was anything in connection with any facts and circumstances to indicate wilfulness, or an attempt to evade, or an evasion of income taxes. [1322]

Now the indictment in this case, if the court please, charges that on or about the 14th day of March 1945—I am going to eliminate the reference to Ormont because this court has eliminated it—Phillip Himmelfarb wilfully—and that I believe is a matter

that your Honor must consider in determining this motion, as to whether the evidence establishes that he did wilfully, whether there is any evidence—knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by Phillip Himmelfarb in the United States of America for the calendar year 1944 by preparing or causing to be prepared and filed and causing to be filed a false and fraudulent income tax return. There is nothing before this court, in my opinion, of any evidence indicating that the 1944 return was filed that was false or fraudulent.

But this continues on to state, wherein they stated that his net income for the said calendar year, computing it on the community property basis, was \$4,111.74 for income tax purposes and that the amount of the tax due and owing thereon was \$656, whereas as he then and there well knew the net income for said calendar year computed on a community property basis was the sum of \$17,752.65, and that his net income he owed to the United States of America an income tax of \$5,843.91. I say to your Honor that there isn't a scintilla of evidence in this case from which your Honor or anyone else can say or [1323] can infer that Mr. Himmelfarb's net income for the calendar year 1944 computed on the community property basis was \$17,752.65. And I am not talking about that precise amount. There is no evidence of any amount as being the net income of this defendant of whatsoever kind or nature other than what he himself has reported in his 1944 return. And cer-

tainly there is no evidence that any tax on it was the amount of \$5,843.91 or any other sum in excess of what he showed. And this is with reference to the filing of the 1944 return which was filed on or about the date of March 15, 1945.

Then it continues on to say, by concealing and attempting to conceal from the Collector and all proper officers the true and correct gross net income received by him during the calendar year. I submit that with respect to the 1944 returns taken alone, or with respect to the 1944 returns taken together, that they don't establish and in and of themselves cannot establish with the aid of testimony, and there is none, an offense in this case. And because of the fact that I mentioned at the outset, this is one that prejudice can result if your Honor in resolving a doubt does not resolve it in favor of the defendant, a prejudice can result to the defendant which is not always true and present in other cases.

I think your Honor will agree with me when I say that the jury——

The Court: The motion could have been made for a separate [1324] trial. It wasn't made before me, and it doesn't appear in the record that it was made. If there was fear that there was some prejudice that might result from the trial of the two defendants together, a motion for a separate trial could have been made.

Mr. Katz: Your Honor, the matter of a separate trial was such, in the first place—I believe your Honor knows that I did not come into this

case until five days before the trial—in the second case, at the time that I did come into the case rather than being in a position of making a motion for a separate trial I stepped into a case in which the government was attempting to consolidate the trial of this case with another case, and under those circumstances I don't believe, at least the defendant Himmelfarb, can be charged with that.

The Court: I appreciate the difficulty with which counsel are confronted when they are representing separate defendants and there are multiple defendants charged, and for that reason, and for the reason that I would consider it in my duty in any event, I have taken the precaution which I thought the law would permit so as to prevent any prejudice coming to either one or the other of the defendants by virtue of any testimony, and I have repeated instructions and statements to the jury. While I realize that it is difficult in a long trial for one trained in the evidence, and probably [1325] for one who is not trained in hearing evidence and considering matters, to segregate all of the items, nevertheless that is the way the law requires it to be done, and one of the functions of the argument is for the lawyer representing the individual defendant to isolate only the testimony which relates to him.

Mr. Katz: If the court please, I don't believe there is any question that in any view of this case, even by one prejudiced against him, in so far as the evidence against Himmelfarb is concerned, but must of necessity be that it is very thin. My con-

tention to your Honor is that it goes to the point that it is so thin it is transparent, and what I am asking this court to do is to look through it, with this thought in mind, that the jurors not only have in this case the effect of the intermingling of testimony in one case which they must segregate, but there are certain evidence that came in as against the defendant Ormont which is of a nature that in and of itself, while it shouldn't be considered by the jury in arriving at any determination as to guilt and innocence, it is the kind and type of testimony that inevitably and of necessity prejudices jurors against defendants. And it is evidence that came in against another defendant which will inevitably prejudice a defendant as against whom that evidence didn't come in.

It is because of all those factors in this case and because [1326] this court can, in the light of the evidence and in the light of this record, exercise the power that it has to grant the motion that I make, that I ask this court so to do.

The Court: Counsel, I followed the testimony that has come in since the previous motion, and there has been nothing in it that would cause me to change the conclusion which I reached upon consideration of your motion at the end of the government's case. I am still of the same opinion that it should be denied, and it will be denied.

I will not assign my reasons, that is, by resume of the testimony, that I think connects the defendant with it because that is the prosecution's job to the jury and prejudice might result to the defend-

ant were I to make the analysis of testimony which I think I should do and am doing at this stage of the trial.

The motion on behalf of the defendant Himmel-farb for a judgment of acquittal as to count 2 will be denied.

Mr. Katz: If the court please, I now wish to move to strike from the record Exhibits 36-B and 36-C.

(The documents referred to were passed to the court.)

Mr. Katz: This motion to strike is, if the court please, in effect a renewal of an objection originally made to the introduction of them in evidence.

My objection is based upon these grounds: Exhibits 36-B and 36-C were admitted without foundation because other [1327] than the testimony of Mr. Pingree that they were the records of the bank and to which account, they have never been connected up by way of testimony in any form.

The Court: 1942 and '43 is 36-C, and 36-B is 1945, and 36-A is 1944, I guess.

Mr. Katz: Yes.

First and foremost, those cover periods that are prior and subsequent to the period involved in this case. They are not within the issues and there has been no testimony to indicate that any——

The Court: Yes, I think these ought to be stricken.

Mr. Strong: Your Honor please, may I be heard?

The Court: Yes.

Mr. Strong: These exhibits were produced at the demand of the defendants. As your Honor recalls, I put in certain exhibits——

The Court: They were not introduced in evidence; they were merely produced.

Mr. Strong: As part of the picture as to what the account was, and the witness had to go back to his bank and come back here and it made an impression, as far as I am concerned, as though we were keeping something from the jury here. Then these things were brought in and then they were attached as a part of that document.

As an additional reason I have this, the defendants have [1328] now introduced the returns for 1945 in connection with their hypothetical-question witness here this morning, as to Mr. Himmelfarb and the entire question of income and when it was earned and whether it was properly reported, whether it was part of the income for 1944 or part of the income for preceding years or for succeeding years, is one of the questions before the jury. They have to determine what the income was that the defendant Himmelfarb earned during 1944 and how much of it was reported and how much of it he didn't report. I think on that basis even if nothing more that that exhibit should be present.

The Court: I think that 1945 probably by virtue of admission of the defense matter, which is to say 36-B ought to stay in the record.

Mr. Katz: May I say this in that connection, if the court please, that with respect to the period 1945 there has been no testimony respecting either

the matter of deposits or withdrawals. There is nothing to show that any part of it was income, nothing to show that it wasn't income that wasn't reported, and then to receive in evidence without such a foundation and to permit counsel to approach the jury and read figures from records of this type where it hasn't been connected or established by evidence, to state to them that this is unexplained income from the standpoint of the prosecution, it may have a semblance of truth in it because [1329] they haven't explained it to be anything, and it isn't incumbent upon the defense to show anything.

The Court: I haven't seen myself change my mind so often, but you have talked me out of it again.

Mr. Strong: May I go back to it?

The Court: Exhibit 30-C is stricken from the record. Exhibit 36-B, while it is not admissible in connection with the 1945 return, I think that there is not sufficient foundation for it and it well might be that this would be highly prejudicial. It shows, for instance, a deposit of \$21,000, another one for \$16,000, in the early part of 1946, and \$300, and the like. I do not think that there is sufficient foundation to admit it. [1330]

Mr. Strong: Will your Honor inform the jury when they come in that those exhibits were stricken upon motion of the defendant Himmelfarb?

The Court: If somebody will remind me of it, I will.

Mr. Strong: I will, your Honor.

The Court: Very well.

Mr. Katz: Now, if the Court please, I am going to make a motion upon the same grounds and for the same reason that there hasn't been any testimony connecting 36-A, 32, 33, 34 and 35 in any way with this case other than they are bank records.

The Court: Let me see them.

(The documents referred to were passed to the Court.)

Mr. Katz: There is no foundation laid for them and I believe that they too should be stricken.

The Court: Now 33 is a deposit ticket in 1945, May 26th. I don't believe there is any foundation for that.

Mr. Strong: That is two days after the fiscal year return, your Honor. The jury may draw inferences which I may argue, if your Honor permits.

The Court: I do not think it will be material.

Mr. Strong: It goes to willfulness, your Honor.

The Court: Exhibit 34 is dated January 20, 1945. That is within the period covered by the 1945 return, Exhibit 6. Exhibit 32 is the signature card of the defendant Himmelfarb. [1331] Exhibit 35 is a check of January 20, 1945. Exhibit 36-A is the 1943 and 1944 bank statements.

The motion to strike Exhibit 33 will be granted, and it will be denied as to Exhibits 32, 34, 35 and 36-A.

Mr. Robnett: Your Honor please, at this time on behalf of the defendant Samuel Ormont, I wish to renew the motion I made at the close of the

Government's evidence to strike various parts of the evidence without repeating it, if I may.

The Court: I granted part of your motion.

Mr. Robnett: You granted part, but the part that was not granted. I move to strike Mr. Eustice's testimony, if you will recall, and the bond records.

The Court: Yes, I recall.

Mr. Robnett: Without restating it and the grounds, I would like at this time to renew that motion.

The Court: The motion is denied.

Mr. Robnett: Now at the same time I would like at this time to renew my motion that I made at the close of the Government's evidence for an acquittal of the defendant Samuel Ormont, deeming it a separate motion as to each count, Count 1, Count 3 and Count 4, and on the same ground that I stated before, including the ground of once in jeopardy.

Also I wish to call your Honor's attention in that respect—in respect to the motion in general, I mean—to what I conceive to be the rule that I think should apply in [1332] passing upon those counts, taking them separately, particularly Counts 3 and 4, Count 4 being for 1942 and Count 3 being for 1943. Your Honor expressed certain views on that, you will recall.

I want to call your Honor's attention to two cases, *Edwards v. United States* 7 F(2d) 357, and *Wright v. United States* 227 Fed. 855, and which are cited in *Housel and Walser*, Second Edition, on page 540.

The Court: Housel and Walser about what?

Mr. Robnett: "Defending and Prosecuting Federal Criminal Cases." [1333]

There is said in there,—and those cases are cited as supporting that—the defendant is presumed to be innocent until proved guilty beyond a reasonable doubt. The burden of proof is upon the Government. Consequently, evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. And unless there is substantial evidence of facts which excludes every reasonable hypothesis but guilt, it is the duty of the trial court to instruct the jury to return a verdict for the defendant. It used to be that we asked for an instructed verdict, and now it is by a motion for acquittal.

The Court: The same rule, but a change in name.

Mr. Robnett: That is right. But the basis upon which your Honor has authority to act, I believe is a part of the text I read, that where the evidence is as consistent with the presumption of guilt—

The Court: I will so instruct the jury. But that is up to them, to weigh the evidence. I cannot, at this stage of the proceedings, weigh the evidence.

Mr. Robnett: But, your Honor, it is difficult, I think, hearing the case, to not hear the evidence and arrive at a conclusion, which I believe you have, as to those two counts. Particularly, there is no substantial evidence there to sustain a verdict, and that the verdict should be for the defendant Samuel

Ormont on those particular counts, because all the [1334] evidence of the plaintiff, practically all of it, or the gist of the case, is based upon hearsay, and such like, and though even mere opinions, and things like that can still be true, and he can be innocent, as we have illustrated here in this case, by the cross examination, and also in the evidence I have introduced here.

Mr. Eustice took checks, and said he did not know what they used them for, he did not know what was done with these, and therefore he charged it up as certain unexplained funds; that he bought certain bonds, and that they have not been explained, and, therefore, in doing the reverse of what is the rule, they are making the defendant prove his innocence rather than presume he is innocent; and making the Government prove guilt. And I think your Honor should yourself grant an acquittal, which is like the old instruction to return a verdict of acquittal.

The Court: On Count 1 I am satisfied that I should grant it. I was somewhat in doubt as to Counts 3 and 4, as I previously indicated, and was not too firmly of the conviction that my conviction was correct as to Counts 3 and 4.

Mr. Robnett: Those are the ones I am urging this motion to, your Honor. The Government is throwing the burden on us to prove innocence, by coming in, and saying this was not explained, and, therefore, if your Honor sends us to the jury with that kind of evidence—— [1335]

The Court: I am inclined to think you are right as to 1942 and 1943. There isn't any evidence in the record which is similar to that as to 1944, which, without commenting on the weight of the evidence, certainly indicates that the jury can reasonably conclude, beyond a reasonable doubt, that the defendant did receive some considerable sum of money in 1944, which he reported by his 1945 joint return.

But, on Counts 2 and 3, the whole case is built up by an arbitrary accounting method used by the Government agent. When I say "arbitrary" I mean not in a critical sense. I mean in the sense that he takes a figure and says, "This is it."

Mr. Robnett: Just a theory.

Mr. Strong: I thought we had gone into all that.

The Court: We did, but as I indicated, I am not too sure that my conclusion was correct. In fact, I gave consideration to reversing myself on my own motion.

Mr. Strong: If your Honor please, first I would like to correct an impression which I think Mr. Robnett was unfair in leaving with this Court. Mr. Eustice never said: I can't account for it, or haven't accounted for it. It was the defendant who accounted for it.

The Court: That is Mr. Robnett's point. Mr. Eustice said the defendant could not explain this, and he charged it to income.

Mr. Strong: There are cases which say precisely that [1336] procedure is admissible; that any money received by the defendant, and is not ex-

plained by him, and that came from other sources than income, is income. Mr. Eustice was not testifying from figures he pulled out of thin air. The records are right here in evidence. Even if Mr. Eustice did not express an opinion, I submit I can take the same records and argue to the jury from them just how much money the defendant deposited during that period to his account.

The Court: You can't take a person's books, and total his bank accounts, and reach a conclusion, and say that that is unexplained, as you can maybe in a civil case, where you can weigh the evidence only by the preponderance rule, and would be entitled to judgment. But this is a criminal case.

Let me say, the way I view it right now, that if I were sitting in judgment, without a jury, on Counts 2 and 3, I would be forced to acquit the defendant Ormont on Counts 3 and 4. But I am not sitting in judgment.

Mr. Strong: The test which Mr. Robnett gave to your Honor is not the test. The test is not whether your Honor, as a reasonable person would do it, but whether the evidence is such that no other reasonable person can possibly reach the conclusion that the defendant is guilty.

I submit on the record here your Honor cannot say there is no evidence here upon which some other reasonable people, in the four of twelve jurors, cannot reach a conclusion to the [1337] effect that the defendant is guilty with respect to those two counts.

The Court: It has to be substantial evidence.

Mr. Strong: Besides, all of the evidence of the books and records themselves, which are in evidence, and upon the evidence of Mr. Link, of the falsification of records during this period, at the request of Mr. Ormont, all of the sums of money which Mr. Ormont collected, but were not part of the money which he reported for those years; besides that, there is the testimony of the statements of the defendant himself in the form of this letter which he submitted, and this document went in evidence——

The Court: Not as to 1942 and 1943. Only 1944.

Mr. Robnett: That is right, your Honor.

Mr. Strong: There were other bases, your Honor. Before your Honor makes a definite decision, I would like your Honor to reserve ruling until at least tomorrow morning, because I am convinced that is the law, that the procedure followed by Mr. Eustice in allocating that money is the procedure required and permitted by the Internal Revenue to an agent, under circumstances such as this. I think I can show the Court that it is so held.

The Court: Yes, I think that you have probably been put to it a number of times on appeal, where, as the Circuit Court has remarked, where somebody is obviously guilty, they [1338] want to do so and so. I think it is not good law, on a criminal charge against a person, to let an agent, however credible he is, or sincere he might be, upon a hypothesis to build up a crime.

Mr. Strong: Your Honor, there are only some sources from which a person gets money. He either

earns it as income, or takes it in as a loan, which he has got to repay, or gets it from somewhere else, which he won't explain. That is also income.

The Court: Which he won't explain—there is a difference. If that were the case, there is another crime here, which these defendants have not been charged with—refusing to give evidence, or something like that. They might have charged him with the crime of refusing to give the information, but that is a different offense.

Mr. Strong: Will your Honor reserve ruling, so that I can bring authorities tomorrow morning? There is no haste, and I would like to have your Honor take the period from five minutes after 4:00 to 10:00 o'clock tomorrow morning, to hear a motion.

Mr. Robnett: It is a question of preparation, your Honor. We have to know before.

The Court: I think you have to know, before your instructions are in.

Mr. Strong: I don't assume your Honor will foreclose me [1339] from asking a reconsideration, in any event, tomorrow morning.

The Court: Then I would have to go to work, and let it go over.

Mr. Strong: We have Supreme Court cases, your Honor, which may be convincing.

The Court: Yes, there are a great many Supreme Court cases which condemn the method in connection with other matters. I am pretty familiar with the cases and law on the subject, I think, counsel.

I will grant the motion for a judgment of acquittal as to Counts 3 and 4, as to the defendant Sam Ormont; and the case will go to the jury as to the defendant Sam Ormont, on Count 1 only.

Mr. Strong: I will move your Honor to reconsider tomorrow morning.

Mr. Robnett: Your Honor, under those circumstances, I now move to strike all of the testimony and the evidence given by the witness Eustice, as to the years 1942 and 1943, upon the ground that it is incompetent, irrelevant and immaterial, and prejudicial, if it is allowed to remain in before the jury, as to 1944.

The Court: No, I think that can remain in the record as evidence of the intent or wilfulness of Sam Ormont as to his 1944 income.

The motion is denied. [1340]

Mr. Robnett: I move to strike all of the evidence of the witness Link, upon the ground that that evidence is prejudicial, particularly as to all the evidence as to 1942 and 1943.

The Court: For the same reason, in this type of offense that evidence is admissible to show state of mind of the defendant, and the possibility or probability, or the lack of it, as to whether or not, if he did anything, what he did was wilful.

Mr. Robnett: All right, I thank your Honor.

The Court: Don't thank me. I would not do it if I did not think you were entitled to it. We will recess until 9:00 o'clock in the morning, and as I indicated, it will be necessary for the defendants to be present.

(Whereupon, at 4:20 o'clock p.m. Wednesday, June 11, 1947, an adjournment was taken until Thursday, June 12, 1947, at 9:00 o'clock a.m.) [1341]

Los Angeles, California, June 12, 1947
9:30 o'Clock A.M.

CONFERENCE ON INSTRUCTIONS

(The following proceedings were had in chambers outside the presence of the jury:)

Mr. Strong: Before we start the instructions, if your Honor permits, I would like to be heard upon the question of whether or not the motions which have been granted on Counts 3 and 4 to dismiss should be reconsidered.

The Court: All right.

Mr. Strong: I would like to outline very briefly—I won't take up much time—the evidence which I think is sufficient to permit the counts to go to the jury.

First of all, of course there is the testimony of Mr. Eustice, which is predicated upon the books and records which are in evidence, and also upon the books of the Acme Meat Company which of course we cannot gain, and they are therefore for that reason not in evidence; but his testimony as to the contents of those books becomes the best evidence at this time.

Mr. Eustice in his testimony has accounted for all of the funds and has shown that in addition

there were funds which were not shown to have come from sources other than income. That testimony, your Honor expressed some concern over as being possibly insufficient. I would like to read just one short thing that I have here, which is a discussion [1344] of the type of evidence which the courts have accepted in criminal prosecutions to establish taxable income beyond that which had been reported, and the type of evidence that has been admitted as establishing taxable income beyond that which is reported, which was evidence with reference to what is shown by the bank accounts, simply periodical deposits in accounts which the taxpayer controlled, plus the showing that he had an income-producing business. Just those two things, deposits to his bank account and a showing that he had an income-producing business.

I would like to give your Honor some of the citations. First there is the case of *Gleckman v. United States*, 80 F. (2d) 394, certiorari denied 297 U. S. 709; *United States v. Miro*, 60 F. (2d) 58; *Oliver v. United States*, 54 F. (2d) 48, certiorari denied 285 U. S. 543; *Guzik v. United States*, 54 F. (2d) 618, certiorari denied 285 U. S. 545; *Caponi v. United States*, 51 F (2d) 609, certiorari denied 284 U. S. 669; *Orzechowski v. United States*, 37 F. (2d) 713; *Malone v. United States*, 94 F. (2d) 281, certiorari denied 304 U. S. 562; *Pascen v. United States*, 70 F. (2d) 491; *Sinner v. United States*, 58 F. (2d) 74; *United States v. Zimmerman*, 108 F. (2d) 370; *Shadrick v. U. S.*, 77 F. (2d)

961, certiorari denied 317 U. S. 637; *Kitrel v. United States*, 79 F. (2d) 259, certiorari denied 296 U. S. 643.

In all those cases the evidence which related to an analysis of the taxpayer's bank account and showing that he had [1345] taxable source, or rather a source of income, the mere fact that he had these deposits in the bank which were there and that he had a source of income, was sufficient to establish the Government's contention that that money was income even though it wasn't shown exactly where it came from.

The Court: Well, taking your first case here, the Gleckman case, just opening it and not reading the case, I see there were other elements that were present in that case. He used false and fictitious names and he used different banks scattered throughout different sections of the country.

Mr. Strong: That goes to his willfulness, your Honor.

The Court: It also adds the other element there that I do not think is present in this case.

Mr. Strong: I am pointing out the type of testimony.

The Court: And in most of the cases—I haven't read all of those cases but I have read a great many of them—in most of the cases upon which that was the sole type of evidence there was present an element similar to the one that I was suggesting here that was present in the Gleckman case.

Mr. Strong: I think that we have all of the other elements present here, and I would like to detail them now, if your Honor please.

The Court: All right.

Mr. Strong: Then of course we have the returns themselves for the two years which show what he reported. In [1346] addition to that we had testimony yesterday as to how much money the defendant said he accumulated and what he did with it. If your Honor remembers, the defendant said he was carrying a lot of cash around and one of the reasons, the main reason, was that his mother had had some difficulties with some bank. I think that although your Honor didn't permit me to ask this defendant the question of what deposits he made during those years, the deposits are in evidence and I can argue from them because the facts and figures are there, and I can show to your Honor and to the jury that in each and every one of the years that the defendant said that he was keeping out this money because he was worried about the banking situation and didn't want to keep his eggs all in one basket, that he had tremendous deposits in his personal accounts in the bank, for example, in the year 1941 he deposited \$21,000 and his income from his own income tax returns for that year was just a little over \$7000, and for the year 1942 those bank deposits show that he deposited over \$24,000 and his income, as he reported it for that year and as he himself testified, was in the vicinity of \$9000. I think that the jury is entitled to weigh the credibility of this witness who says that he had cash on

hand and even assuming he had cash on hand, on his own testimony he said that he spent between \$8000 and \$9000 in buying bonds during 1943 out of the \$11,000 or 12,000 cash he had. [1347]

But Mr. Eustice has accounted for over \$27,000 unexplained which were deposited during the period 1942 to April 30, 1944.

Then on the bonds themselves, your Honor, the bonds which were bought in 1943 totaled in excess of \$51,000, so even if he bought \$8000 worth of bonds, as he says, with the cash the jury still can consider the fact that whether he did have cash or didn't have cash and that all goes to willfulness. That is one of the elements. And that was the explanation which the witness himself gave.

The Court: It goes to willfulness and I have left it in.

Mr. Strong: It also goes to income.

The Court: As a matter appropriately in the record for the jury to determine, whether or not in 1944, if they find that he did not report his return, he failed to report it willfully.

Mr. Strong: I am referring only to the year 1943. It goes to willfulness as to 1943. The mere fact that he bought \$51,000 worth of bonds in 1943, which is way in excess of the income that he reported, plus the fact that he himself says that he only spent \$8000 or \$9000 out of his cash, if there were such cash to buy these bonds, there is that tremendous amount of unexplained bonds which he purchased during that year, and which is another element, plus the testimony of Mr. Eustice,

which I think we are entitled to have the jury consider [1348] in determining whether he had that income, especially since he is making tremendous deposits each year, especially since he is saying that he isn't putting all his money in there and at the same time he is putting so much more than he is keeping out that it makes questionable, to my mind, as to whether the jury will believe it. I think that they should have the opportunity of deciding whether to believe him or not.

Then there is the testimony of Mr. Link, the testimony that there were false entries on the very books of the Acme Meat Company; the effect of those false entries is to overstate the amount of money which was paid, and that means that he therefore eventually understated his net income by the amount that he overstated falsely, as Mr. Link showed, the amounts which he claimed were paid.

Besides that, as to 1942 we have of course the invoices which bear Mr. Ormont's signature, showing that he got that money, and Mr. Link testified that he entered every invoice, he testified that the income tax return was based upon information which was given to him by Mr. Ormont which he put on the books and that those omitted invoices were not part of that income tax, that they were held out. The fact that it was testified as income is shown on the face of these invoices. It says paid and it has Mr. Ormont's signature and a date and shows exactly when he received the money on each and [1349] every one of the invoices.

Then there is another item which I think has been overlooked. I called Mr. Smith, who testified about a loan that he had made from Ormont, and it was stipulated by Mr. Robnett, I believe, that the amount of \$63 was paid in interest by Mr. Smith to Mr. Ormont in 1943. If your Honor will look at the income tax return there isn't a single cent reported for interest. Now that is one of the items. That also tends to indicate that there was a concealment of \$63 which he never put down.

Then of course we have the bank deposits and the interest on the deposits. There is nothing as to interest in the 1943 return. Yet those bank deposits and those bank records will show that he did receive interest during that year.

Now for all of these items, I submit to your Honor, taken together they certainly furnish a sufficient basis for reasonable people to disagree. If that is the case I think the test has been met for sending it to the jury as to the year 1943.

I won't go into 1943 because it is thinner, it doesn't have all these elements, but these elements are present as to 1943, and I think that a very strong element present, a very strong one to my mind, is the fact that Mr. Ormont testifies he has only got \$12,000 in cash and he testified he accumulates it at the rate of between \$700 and \$1000 a year, and [1350] yet his bank deposits which are in evidence show \$24,000 deposited in 1942 as against his own reported income for that year of only some \$9000. And besides that there is \$21,000 reported in 1941 as against his income, which he admits himself, of some \$7400.

His explanation is subject on its face to the jury's questioning. And if the jury doesn't believe him they can take that into account in the entire situation as to what Mr. Link said on the false entries, that there is more reason to believe Mr. Link, and as to the omitted invoices there is more reason to believe Mr. Link. Mr. Smith nobody contradicts.

I submit to your Honor that as to 1943 there is sufficient evidence to permit the jury to have the case as to that year. That is Count 3 of the indictment.

The Court: Do you want to be heard further?

Mr. Robnett: Well, your Honor, I think this has been reviewed before.

In the first place, you will recall that Mr. Eustice himself—and that is what counsel is using as his evidence—Mr. Eustice is only giving an assumption and an opinion, but he accounted himself for \$37,000 worth of bonds that counsel is talking about and said he could trace all the funds for that \$37,000, that there were some \$13,000 or \$14,000 that he didn't trace. [1351]

Also on redirect he testified he didn't know what various checks and items were used for and therefore not knowing what they were used for he didn't trace those out as being for bonds. It has been proved here now conclusively—there is no dispute on it—that what particular checks were used to the tune of several thousand dollars and in the cash that Mr. Ormont testified that he used, and it shows that there are certain items of cash that

he did have all the way through from the time they talked to him in the first instance and they all admitted that he had substantial amounts of cash throughout the years, and they gave him no credit for that. The very fact that they didn't even consider all the evidence, they just arbitrarily ignored things they wanted to ignore and took in things they wanted to, I think that is sufficient.

The Court: As I see the Government's case on Counts 3 and 4, it is based principally upon the testimony of the witness Eustice. All these other things are deductive in their reasoning and I do not think it is sufficient. I will let my ruling stand as to Counts 3 and 4.

Now as to the instructions, these were just laid on my desk, these very voluminous instructions, and we certainly cannot go through all of these by 10:00 o'clock.

Mr. Katz: I do not believe so, your Honor.

Mr. Strong: And then I would like about half an hour after we are finished to prepare my argument. [1352]

The Court: If that is the case. I think we will go right ahead when the jury comes and excuse them to, say, 1:30.

Then how long will you want? This will only be as to one count now.

Mr. Strong: I would need at least an hour to an hour and a half for the defendant Ormont and at least half an hour to three-quarters of an hour as to the defendant Himmelfarb.

The Court: On opening?

Mr. Strong: Yes.

Then I need at least half an hour on my closing. That is a maximum. I won't say at least, probably since I am tired and also most of this has already gone in, I think the jury is pretty clear on it, so I will say the maximum is about an hour and a half on opening on Ormont and half an hour opening on Himmelfarb and a maximum of half an hour closing on Ormont and about 15 minutes closing on Himmelfarb.

The Court: I think in view of the fact that it is pending only as to Count 1 on each defendant now that the case seems to me wouldn't require that amount of argument because on Count 1 admittedly the defendant Ormont and the defendant Himmelfarb both with relation to that received a large sum of money—I won't admittedly but it certainly could be argued that it was—a large sum of money which they reported by their joint return. So Count 1 seems to me to turn upon the simple proposition as to whether or not they were or were not under the law entitled to file a fiscal year return. If they were not [1353] then the income was there and it is merely a matter of willfulness, it would seem to me. [1354]

Mr. Strong: Except we have been in trial four weeks, and most of that time has been spent by the defense in cross-examining my witnesses, and I feel it is my duty, in a case like this, to seek to clarify some of the matters which I considered were beclouded through cross-examination.

The Court: I want to get the case to the jury tomorrow. I would like to get it to the jury at

2:00 o'clock tomorrow, and give my instructions at 2:00, so that the jury will have the afternoon to deliberate on it.

Mr. Robnett: As I understood your Honor's ruling yesterday, after the motion was granted, I moved to strike certain testimony, and it was only allowed to remain in and be in on intent alone. Am I correct in that? That was all that volume of testimony went in for 1944 as to 1942 and 1943.

The Court: I allowed it to remain solely because the Government was entitled to have it in the record, and the jury is entitled to have it considered on the question of intent and wilfulness as to 1944. That is the only materiality of that evidence now.

Mr. Strong: And it will be limited to that situation?

The Court: Certainly.

Mr. Robnett: It shouldn't take you so long to argue then.

Mr. Strong: I think I am the best judge as to what I should argue in my case, Mr. Robnett. [1355]

Mr. Robnett: It wouldn't be for me.

Mr. Strong: To me every point consists of a lot of details.

The Court: I suppose you have agreed as to the one who may argue last?

Mr. Katz: No, as a matter of fact I am going to take the order, and I want to make my argument first.

The Court: Maybe we can conclude Mr. Strong's opening argument this afternoon, and your argument too.

Mr. Strong: I think we probably can.

The Court: And Mr. Robnett, if we start at 9:30 in the morning, should not take over two hours.

Mr. Robnett: I hope I don't need that. I don't know how much Mr. Strong will compel me to take, by his argument. I think I can finish in an hour, but I would not like to be limited.

The Court: We will hold to that schedule of completing your argument this afternoon, and Mr. Katz' argument.

Mr. Katz: On that basis that would allow me how much time, your Honor?

The Court: I think probably Mr. Strong will conclude his opening argument in an hour.

Mr. Strong: This technique of having me stand on the lectern will have a definite effect.

Mr. Katz: I prefer to use the lectern. I think it makes [1356] a better procedure.

The Court: It does. It is surprising how much easier it is to hear a lawyer when he is talking at the lectern, than when he is sitting down at a table in the court room.

Mr. Katz: I think it makes a better impression for the lawyer to stand.

The Court: I think probably Mr. Strong will be able to conclude his argument in an hour. He ordinarily is not very long winded. So that will give you whatever time you need to conclude your argument this afternoon. We will stay until it is finished.

Mr. Katz: I am in this position, because of the fact of the limited amount of testimony which came in, and everything else, I feel I must of necessity delineate what is in the record.

The Court: We will get on to the instructions. I haven't had an opportunity to glance through all of the instructions submitted by the defendants, but I notice the first fifteen or twenty of Ormont's are covered, I believe, by my general instructions.

Mr. Robnett: Possibly so.

The Court: Is that true of yours too, Mr. Katz?

Mr. Katz: That is true, your Honor, of a number of them. They are the first of the group of instructions. I just want to run through them. No. 14 is one that I submitted at the [1357] outset. I did not yank it. It became immaterial to my case.

The Court: Yes, you have it in there.

Mr. Katz: No. 15, I don't believe is covered by your Honor's general instructions.

The Court: No, it is not.

Mr. Katz: Nor is 16 covered by your general instructions. I don't believe No. 17 is. No. 18 may be, but in a different form. 19 is not.

The Court: On your No. 16, I think that is covered by your 15. 16 I don't think is the law. It goes too far, I think, but 15 is covered—character. As to 17, Mr. Strong has one of his instructions.

Mr. Katz: I don't know that 17 or 18 are covered.

The Court: 19; I have a general instruction on argument. 20 is the repetition of a general instruction.

Mr. Katz: I think that is correct. 21 is covered by your Honor.

The Court: Maybe 22. I will turn it over. 24——

Mr. Strong: I assume your Honor is not asking for objections?

The Court: No, I am trying to find out if I should consider these. I think 24 is covered by the question of wilfulness. So is 25.

Mr. Strong: Isn't 24 the same as 22?

The Court: I will turn over 26 and 27. 27 is the same [1358] as 28. 29 is covered.

30, under the heading of wilfulness; and 31, the Government has an instruction which I was just reading when you came in. I will turn that over.

Maybe 32.

33 again is wilfulness.

34 will be covered by the instruction on the fiscal year.

35 again is wilfulness.

36 again relates to wilfulness.

It may be that 37 should be given. I don't know.

38 is the same.

Mr. Katz: It is merely a duplication, your Honor.

The Court: 39 goes into wilfulness.

40. There will be an instruction covering the legal right of a person to avoid taxes, but not evade.

41 again relates to wilfulness.

42 relates to wilfulness.

43: There is an instruction the Government has. I will turn that over.

44 I will give.

45 relates to the same thing.

46. I will give the CALJAC instruction.

Mr. Katz: In connection with that, if the Court please. I didn't prepare it. Does your Honor feel it is proper to give an instruction in the case such as this, that they should [1359] consider, in their determination of the guilt or innocence of the defendant, certain evidence in such determination? I see my No. 46 is an adaptation of this.

The Court: "In the trial of this case there were instances where certain evidence was admitted against one defendant, and denied admission as against the other. Your attention was called to these matters when the rulings were made, but I would urge you again to keep in mind the distinction pointed out in such rulings and their effect. It may be difficult for you, when considering the case, for or against one party, to completely disregard any evidence that you have heard or seen, but that is your plain duty with respect to the evidence not admitted by the Court as against that party, and you must try conscientiously so to treat such a situation."

Mr. Katz: The portion that I omitted is the portion of it with respect to the rulings having been called to their attention.

The Court: 47 is a repetition of 46.

48 I will not give.

Neither 49. We have these marked out for consideration. That's the first batch I have tacked together. Were these general?

Mr. Kosdon: No, some are and some are not.

The Court: You haven't yours numbered?

Mr. Kosdon: No. [1360]

The Court: Reasonable doubt, is the first one.

Mr. Strong: Yes, reasonable doubt. That is a general one.

The Court: The first one is: "You are instructed to return a verdict of not guilty." That is instruction No. 1. I think that we had better have the jury come back at 1:30. Is that agreeable? I will have the Bailiff notify them.

Mr. Strong: That is agreeable, your Honor.

Mr. Katz: Satisfactory.

Mr. Robnett: We stipulate to that.

The Court: Will the Bailiff go up to the jury room and tell them they are excused until 1:30?

Verdict of not guilty, is out.

Reasonable doubt is covered.

The next one, "It is your duty to try this case fairly and impartially between the Government and the defendant."

Mr. Strong: Yes, that is No. 3.

The Court: That covers a presumption of innocence. That is covered.

The mere fact that an indictment has been filed. That is covered by a general instruction.

The individual opinion of each juror, is covered.

Presumption of innocence is not a matter of form, is covered.

Any essential fact necessary to complete a chain—is [1361] covered.

The fact must be proven consistent with the theory of guilt, is covered.

It is not your duty to look for a theory—that is covered.

Two or more reasonable inferences—that is covered.

The chain of circumstances—that is covered.

The next one is covered.

If you believe any witness in the case—There isn't anybody who falls within that category of hope of non-prosecution.

If you believe from the evidence in this case that any witness in the case was influenced or induced——

Mr. Kosdon: Not now.

Mr. Robnett: There could have been an inference from Link. He was an informer.

Mr. Strong: There is no showing that anything was held out.

The Court: They can still believe it from what he said.

Mr. Strong: I think, unless there is some showing that there is a possibility, from his having been prosecuted—but I won't even take the time to argue it. If your Honor wants it to go in, that is all there is to it.

The Court: Extra judicial oral admissions—that is covered. [1362]

Evidence of the defendants' good character. That is covered in the general instructions. I don't know whether it is the one I gave to you.

Mr. Katz: The one I had, I don't believe had reference to it, your Honor.

The Court: Extra judicial oral admissions is in the one I have in the Gage case. I also have one on expert opinion.

Mr. Katz: That one I referred to was on the matter of good character.

The Court: Extra judicial oral admissions or statements of the defendant alone. —I have that marked to give.

The next one, about general good reputation is covered by the one which I will give.

The one about it is neither criminal or unlawful for a person to do; that I will give.

Presumption. I haven't one in those words, but I think it is generally covered by the presumption of innocence. If you wish, I will give it.

You are instructed—the next one——

Mr. Katz: I have submitted a similar one.

The Court: I will lay it aside. The argument of the United States Attorney—I have a general instruction on arguments and statements of lawyers.

The next one about inconsistencies, and rational conclusions, is covered. Not in your language.

Presumption of innocence is covered.

Wilful intent. That will be covered.

Taxpayers on a cash basis.——

Mr. Strong: That is not the law, your Honor.

The Court: He is on a cash basis if he files his income tax return on a cash basis.

Mr. Strong: He says, unless he receives it.

The Court: He need not report it unless he receives it.

Mr. Strong: Constructive reports, deposited to his account. Anyway, I think that was for 1942. That is the only constructive receipt of income.

The Court: No, that is applicable to 1944 also. In other words, if Ormont should have been on a cash basis in 1944, then he received it.

Mr. Strong: I don't think there is any dispute of his being on a cash basis.

The Court: You are instructed if you find in the evidence that the defendant Sam Ormont—I think that ought to be given. [1364]

The Court: The next one now, the instruction as to government bonds bearing two different persons' names as co-owners, and so forth, I will say that I should put that one aside to consider.

The next one, livestock is an agricultural commodity and a product of the soil, what has that to do with this case?

Mr. Robnett: Your Honor, people engaged in that do not have to keep permanent books.

Mr. Strong: There is no evidence that Mr. Ormont is growing anything.

Mr. Kosdon: He is an agent in selling livestock.

Mr. Strong: It doesn't say selling, it says growing and selling.

The Court: Where does that begin?

Mr. Strong: It is the next instruction.

The Court: Those are out, those three instructions.

Mr. Kosdon: That books need not be formal? I think that is the law, your Honor.

The Court: I think maybe so.

Mr. Strong: We have an instruction on books.

The Court: I know you have but I will put it aside.

The next instruction, being a gift, what has that to do with this case?

Mr. Kosdon: There is evidence in the record that there were gifts, not only gifts but money was paid voluntarily, or [1365] whatever the so-called customer, whoever he was, was willing to pay.

Mr. Robnett: And there is evidence that people came in on days when they weren't buying at all and gave them money.

The Court: If that is the case then I should give an instruction on the Internal Revenue Code, if that is one of your defensive matters that you expect to argue, that there are gift taxes. This is a blanket charge to defeat and evade, and if the defendant was under compulsion to report or pay tax on gifts, that is another matter.

Mr. Robnett: I don't think he was as income. Gift taxes are a different tax.

Mr. Kosdon: It is an entirely different type of tax than the type of tax that is now before them, unless it is in excess of at least, I believe, \$3,000 from any one individual, if I am not mistaken.

Mr. Strong: As your Honor pointed out, all the evidence in this case in effect shows that they got that money, they reported it as taxable income, and the main problem is what year.

Mr. Kosdon: Maybe we might advise our clients to file for a refund.

Mr. Strong: They are fiscal year returns. It says nothing about gifts and neither does the 1944 return claim that it is gifts. They have no way of claiming it is gifts and there isn't any question involving gifts here. [1366]

Mr. Robnett: Mr. Ormont said something about gifts.

The Court: That there were extra charges.

Mr. Robnett: Yes, extra charges, and that they did at times, but they had no uniform charge and a lot of people weren't even charged, and that people came in at different times and gave them money and weren't at that time paying any bills. The charge here is evading income tax, not evading gift tax.

Mr. Kosdon: I have an instruction on that too.

The Court: On those two instructions on gifts, I cannot see that they are proper or should be in the case.

Mr. Robnett: May I at this time inquire if we are precluded from even discussing that phase if your Honor doesn't give an instruction?

The Court: Yes, you have to limit your argument to the matters given. That is the purpose of having this conference in advance.

Mr. Robnett: I think the evidence is in on those things and at least it has some bearing on the matter of intent in the case. It is quite important evidence, I would think.

The Court: I will consider those later.

The next one, that the indictment is a mere charge, that is covered.

The next one, the taxpayer who honestly or incorrectly returns his income, and so forth, that is covered by wilfulness. [1367]

Mr. Kosdon: If the Court please, I think there is evidence in the record to show that the defendant Ormont did go to counsel and that the return was prepared by a certified public accountant, and there is a case that the court specifically held the defendant was not guilty of any criminal intent.

Mr. Strong: That, however, was the 1945 return.

Mr. Kosdon: But on the other hand, if the Court please, it was with the advice of the attorney and the certified public accountant, and that the return was filed on a fiscal basis and was filed in the manner that it was. In other words, there were different methods by which perhaps if a tax were due and owing it could have been paid.

The Court: There is not any evidence in the record that the attorney advised them or that the certified public accountant advised them.

Mr. Strong: That was kept out by objections.

The Court: That is right, it was kept out by the objections. All the evidence was that they consulted an attorney and that the accountant filed the tax and sent these other things in. As to what the accountant told them, since neither defendant took the stand they waived the privilege. So there is not any evidence in the record to warrant the granting of that instruction which, for the purpose of the record, we will [1368] give a number as X-1, and you may have your exception.

Mr. Robnett: All right, your Honor.

However, let me call your Honor's attention to the fact that the accountant was a witness for the prosecution and testified that he received all his instructions from the attorney.

The Court: That is right.

Mr. Robnett: And there is evidence that the attorney was the attorney for the defendant.

The Court: Yes, I know, but in the first place that was in 1945, as to that return, and in the second place there was no evidence and it was kept out by objections which I sustained as to what the attorney told them or what the accountant told them.

The next one, the use of the word attempt in the Code indicates that Congress intended some wilful commission in addition to the wilful omission, that makes up a list of misdemeanors. This is not a misdemeanor, this is a felony.

Mr. Kosdon: That is right, your Honor.

Mr. Robnett: Change the word to felony.

Mr. Strong: The government's instruction reads as to the statute and explains it, your Honor. It explains it in the language of the Spies case.

The Court: I think that all comes under the heading of wilfulness and is covered.

Do you want an exception on that one? [1369]

Mr. Kosdon: Yes, I would like one.

The Court: It will be numbered X-2.

Mr. Kosdon: If your Honor please, as Mr. Strong pointed out at the beginning of the trial, 145(a) and 145(b) of the Internal Revenue Code both include the elements of willfulness. Before one

can be convicted under 145(a) one would also have to be found guilty of the element of willfulness. But I think the distinction between 145(a) and 145 (b) is that in one Congress had intended that some willful commission was done in addition to a willful omission. It is provided for in 145(a).

The Court: I think my general definition on willfulness covers the whole range and category of what constitutes willfulness.

Mr. Strong: And I have given an instruction based on the Spies case just on this very point, your Honor, and it goes into detail on it.

The Court: We will get to that later.

Incidentally, on your exceptions I am marking these and at the conclusion you can take your general objections for the record because unless you except you lose your point.

Mr. Kosdon: Yes, your Honor.

The Court: Now the next one, in weighing the testimony of Internal Revenue officers greater care should be used than in weighing the testimony of ordinary witnesses, I cannot give [1370] that instruction. I have one here on officers and employees of the United States which I give.

Mr. Kosdon: Yes, I noticed that, your Honor. I took that instruction from another instruction. There the word police officer was used and I merely modified it by using the word revenue agent instead of police officer.

The Court: The difficulty with that is that I think it is true in some instances and not in others. I think in this case here we had the example of

the two extremes. I think that the witness Eustice was biased and was arguing his case, whereas the witness Phoebus appeared to me to be as completely impartial as anybody I have ever seen on the witness stand. As a matter of fact, I think that the witness Phoebus was to be congratulated for the manner of giving his testimony because he was frank and candid and completely impartial.

Mr. Strong: I just want to state for the record that Mr. Eustice has not testified in any proceedings and that what your Honor may consider as bias was simply an attempt on his part to answer the questions as asked him, which were very often quite lengthy and involved.

The Court: He is used to arguing across the table to some other accountant, probably.

Do you want a specific exception on that?

Mr. Kosdon: Yes.

The Court: That will be X-3. [1371]

Mr. Kosdon: I think there was evidence in the record particularly with respect to Mr. Bircher who did recite some things which indicated there was some partiality as far as Mr. Bircher was concerned.

The Court: I think my general instruction that they should give no greater weight just because they are an officer of the United States than any other person is sufficient.

The next one, the law relative to the declaration of estimated tax, well, now, there isn't any. While there is evidence in the case here that he filed an estimation of the tax return, the government isn't

basing any of its charge upon the fact that those estimates were wrong. It is based on the fact that he just didn't report it in his final report.

Mr. Robnett: Yes, but I answer that by saying there might be some argument and we ought to have an instruction on that. There might be some argument from the prosecution that the estimate was small the first of the year and it increased as the year went on. That is a fact as shown by how the payments were made.

Mr. Kosdon: The law provides that if you have a tax of a dollar in the year 1945 and earn a million dollars in 1946 all you have to do is file an estimate based on your net income of 1945 irrespective of what the earnings may be the following year.

The Court: I suppose in view of the fact there was some [1372] evidence in there that the jury might take into consideration as either evidence of his wrongdoing or of his wilfulness, for that reason the instruction had better be given.

Mr. Strong: I assume we will discuss them again?

The Court: Yes.

The next one on general reputation is one that is already in. I think one instruction on that is sufficient.

The next one—well, I will lay it aside. We will get to that one again.

The next one, willfully and knowingly, that will be covered.

The next one, that the defendant did actually defraud the government, that is not the charge.

Mr. Kosdon: I believe that is the law, your Honor.

The Court: Of course even if there were, this is a loaded instruction. It says that if such tax was not paid by such defendant without saying when it was not paid.

The Court: The indictment reads, "knowingly, unlawfully and feloniously attempt to defeat and evade." This is an attempt, it is not a charge that he actually did defraud the government, so that will be out.

Do you want a special exception on that?

Mr. Robnett: Yes.

The Court: That will be X-4. State your objection for the record. [1373]

Mr. Kosdon: We wish to take exception to the ruling as to instruction X-4 for the reason that we deem the law to be that there is no attempt to willfully evade any tax if the tax is paid prior to the filing of the return of the indictment.

The Court: The next one is on the subject of willfulness, which will be covered.

The next one, under-estimating, that is covered by the other proposed instruction which you gave, if I give it, so this is merely a duplicate of it.

The next one goes to the question of willfulness.

The next one also is on the question of willfulness.

This one I will lay aside, about the source of income.

Now on this other one about the fiscal year, the government has one which I thought we might work over, so I will lay that aside to be covered. I will give that a number, however, X-5.

Mr. Kosdon: I think Mr. Katz has one, too.

The Court: The next one is a duplication, and it is covered by reasonable doubt and willfulness.

The next one, at the time this indictment was returned on January 22nd a tax in addition to the tax already paid was due and unpaid, I do not think that is the law.

Mr. Robnett: There is one case, the Schenck case, which I believe held that the government must show there was a tax unpaid. [1374]

Mr. Strong: On the date that we charged.

The Court: On the date it was due but not on the date the indictment was returned.

Mr. Robnett: The language doesn't say as to what date.

The Court: I think it is the date due. I will give this a number, X-6. Will you state your objection for the record?

Mr. Robnett: We except to the ruling of the Court for the reason that our construction of the law following the case of United States v. Schenck, 126 F. (2d) 702, means that before a charge of willful evasion can be brought against a defendant the tax must be due and owing at the time the indictment is returned.

The Court: Your next instruction.

Mr. Kosdon: I think that takes in the fiscal year too.

The Court: Yes, that is the fiscal year and that will be covered. I will give a number on that, X-7, and your exceptions will be the same as that which you stated for X-5.

Mr. Kosdon: Yes, your Honor.

The Court: I will lay that aside.

The next one goes to the question of willfulness again and will be covered.

Presumption of innocence is the next one. That will be covered by the general instruction. [1375]

Certain offered evidence might be properly admitted, that is covered by a general instruction. Any statement of counsel, that is covered by a general instruction.

The next one, the presumption of speaking the truth, that is covered.

The opinion, that is covered.

Failure of a defendant to testify, that is covered by the instruction that I will give.

Mr. Robnett: We wouldn't now offer it.

The Court: The next one, we are not concerned with that here.

Mr. Kosdon: That is taken from the Spies case, which is a criminal case, I believe.

Mr. Strong: That wasn't an instruction in the Spies case, that is one of the obiter dicta of the court.

The Court: I do not think that would be proper. Do you want it numbered X-8?

Mr. Robnett: Yes.

The Court: And you except to the giving of

instruction X-8 as the law and that I am not covering it?

Mr. Robnett: That is correct.

The Court: The other one is covered.

Mr. Katz: I take it that your Honor is going to go over all of these again. I have in mind this, if the Court please, the general instruction with regard to willfulness does not [1376] cover the specific matters of the things done as a result of ignorance, mistake, carelessness, negligence, which the cases hold is a defense, and it is my thought that in addition to a general instruction as to what willfulness means that there should be a specific instruction to the effect that acts done as a result of ignorance, mistake, carelessness, negligence, do not constitute an offense.

The Court: I think that instruction on willfulness covers that and I have hammered that out after a lot of argument with different government counsel and defense lawyers, and I have not had a final exception taken to it, but I do not mean to say that they know any more about it than you people do or that I couldn't be wrong. But I have given it so many times that I am satisfied that that covers all the phases that must be taken into consideration as to willfulness.

Mr. Robnett: There were three instructions I noticed here of those that we had—they don't have numbers—two of them particularly that you said would be covered by the instruction on willfulness.

These are the ones, "failure of a taxpayer to report income which he honestly believed was not

taxable does not constitute a willful violation of the Internal Revenue Code”; “failing to account and pay income tax in the proper year, and paying and accounting for the same in a different year by the taxpayer, and under his honest belief that that is when it is [1377] due does not constitute a violation of the Internal Revenue Code.”

I do not believe that those would be covered by the general willfulness instruction.

Mr. Strong: There is no evidence as to that.

Mr. Robnett: Oh, yes, there certainly is. That is one of the arguments. You claim that they should have accounted for it in 1944 and we claim they should have accounted for it in 1945.

Mr. Strong: It may be argument but it is not evidence.

Mr. Robnett: There is plenty of evidence to infer by the fact that they did so account.

The Court: I believe those are covered by the general statement on willfulness.

Mr. Robnett: May we have a special exception?

The Court: Are they numbered?

Mr. Robnett: No, they are not.

The Court: We will mark them X-8 and X-9.

Mr. Robnett: Then also here is one which you claim was covered—I don’t know—“An underestimate of one’s income does not constitute a violation of the Internal Revenue Code, unless such underestimate was willful and intentional.”

The Court: You have another instruction in here on estimates.

Mr. Robnett: I see. All right. [1378]

The Court: It would seem to me that that was a duplicate of your other instruction, which I will determine whether we should give or not.

Mr. Robnett: As to X-8 and X-9, the exception is that they properly state the law and the facts in the case warrant the giving of them, and that they should be given, and they are not covered by any other instruction.

The Court: Very well.

Let me see now. The general plan will be for me to read the general instructions and then come to the charges in the case.

Government's instructions 3 and 4 are out because those counts are out.

Mr. Strong: Do I get exceptions too?

The Court: Surely. [1379]

The Court: Your 14 and 15 also relate to Counts 3 and 4.

Mr. Katz: With respect to Government's instructions——

The Court: Wait until your client gets here.

Mr. Katz: I am sorry. I didn't notice that he had stepped out.

With respect, if the Court please, to Government's instructions, there are two instructions that I wish to call to your Honor's attention with respect to which, if they are going to be given, I wish to note an exception.

The Court: Let us take them one by one.

Mr. Katz: I thought you had gone through them?

The Court: No. I now pull Government's instructions 1 and 2, and go first to Government's instruction No. 5, line 6.

“Failure to collect and pay over tax, or attempt to defeat or evade tax.”

That is the title of the section. That is stricken out. I will read the section, except line 14 I will strike out the punishment, so it will read, line 13:

“upon conviction thereof, shall be punished in the manner provided by law. You are not to be concerned with such punishment, as that is a matter that lies solely within the province, and is the responsibility of the Judge.”

Mr. Katz: If your Honor please, inasmuch as this case is not one having anything to do with failure to collect—— [1380]

The Court: “Any person required under this chapter to collect,”—I have it stricken out. It will read:

“Any person required under this chapter to account for, and pay over any tax imposed by this chapter, who wilfully fails to truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall be guilty of a felony.”

Mr. Strong: If you take that word out, then where on line 5 it says: “The precise wording of the statute follows:” should say, “The precise wording of the statute applicable to this case.”

The Court: "The precise wording of the statute provides."

Mr. Strong: "As applicable to this case." Does Mr. Robnett join in that objection?

Mr. Robnett: Yes.

The Court: "The pertinent portion of the statute provides:"

Mr. Strong: Is it understood, your Honor, unless Mr. Robnett indicates otherwise, he is joining in the objection?

Mr. Robnett: Yes.

The Court: What objection?

Mr. Strong: Whatever exception is made by Mr. Katz.

The Court: Or vice versa.

Mr. Strong: Or vice versa. [1381]

The Court: The next question.

"The charge against each of the defendants in each of the Counts contain in the main two elements. First, whether the defendant named in each of the Counts as owing a tax, did in fact owe more tax than he reported, and second, whether in each instance there was a wilful intent by him to evade and defeat any part of such tax by the filing of the false return."

Then I thought I would give Government's 1 and 2.

Mr. Robnett: As to the one your Honor is considering, as to the paragraph on the second page——

Mr. Katz: Are you turning the page now on No. 5?

The Court: No. I am not turning the page. In

other words, at line 22, I will jump from there to Government's 1 and 2. In other words, I read the law, state the charge, and then give an analysis of it.

Mr. Robnett: I want to except, on 5, to that portion of it starting at line 17 down to and including line 22, upon the ground that it is ambiguous and it indicates the charge against each of the defendants, in each of the Counts, in the plural.

The Court: That is correct.

Mr. Robnett: I think they should be named, and the number of the Count against each one should be specified. In other words, the charge against Sam Ormont is in Count 1 only. [1382]

The Court: I state that, in Government's 1. What I am trying to do here is to break this down. We will go to Government's No. 1. Have you got Government's No. 1?

Mr. Robnett: Yes, I have.

Mr. Strong: If your Honor gives part of Government's 1 in there, I would not ask for the portion running from line 17 to line 22. That was solely preliminary, for the jury.

The Court: I have got to give an instruction that there are two elements to the offense: Did they do what they are charged with doing in the indictment? If they find beyond a reasonable doubt that the defendant did that, they must consider whether or not, beyond a reasonable doubt, they did that wilfully. If they don't find either one was done wilfully, was not done beyond a reasonable doubt, they must acquit. So it has to be stated in shorter terms.

Mr. Strong: I am satisfied with the way it is.

Mr. Katz: Lines 17 to 22, "whether in each instance there was a wilful intent by him to evade and defeat any part of such tax by the filing of a false return," which is practically an assumption or statement that a false return had been filed, and it is a question of intent. It should be set up on the basis of whether there was a false return filed, and whether such return, if false, was wilfully done.

Mr. Strong: The first part of the sentence relates to the return. [1383]

Mr. Katz: No, it relates to the tax.

The Court: Let us go to Government's 1.

Mr. Strong: Might I indicate, lines 23 to 25, those are only for the Court, and are not to be given as part of the instructions.

Mr. Robnett: What is that?

The Court: It is a footnote to me. I will read from 1 to line 16, followed by 5, and then go to 1.

Mr. Robnett: Now you are going back to 1, after reading the statute, is that correct?

The Court: Yes.

Mr. Robnett: As to 1 I want to make this objection, and take this exception to it, particularly to the portion on page 2, where it says: "Also, as to Count one, I want to call to your attention the fact that it refers to an income and Victory tax return, and that since there was no Victory tax payable for the year 1944, the words 'Victory tax' are surplusage, and may be disregarded by you."

I except to that upon the ground that it should not be given; it is included in one part of the charge

in the indictment, and the defendants are here to meet the charge as made in Count 1, and that charge as made is that that was what they did; that the defendants filed a false, and fraudulent income and Victory tax return. There is no charge in there that he did something else; only that. That portion of that [1384] instruction should not be given.

The Court: I think it should be given.

Mr. Robnett: We take our exception.

The Court: Very well, exception may be noted to that.

Mr. Robnett: The exception goes to the fact that there is a variance, and by giving that instruction it violates the variance.

On page 1 of the instructions, line 23, they use the expression: "there was a substantial sum of money which the defendant received as income, and which was taxable during that year."

I think that is not the law. It was merely a substantial sum of money, on the ground that the cases hold that the proof must show that he evaded a substantial part of his tax. There is one case where the man, it was shown, did not report \$10,000, and they held in that case that that was not sufficient proof, because it showed he had an income of a million dollars; and yet, to this jury, maybe \$10 would be substantial, or any sum of that sort.

The Court: I think it might better be changed: "It is sufficient if the Government proves that in addition to the income which the defendant himself reported in his income tax return, there was a substantial sum of money which the defendant received

as income,”—say “The defendant received as income substantially the sum alleged as taxable income during [1385] that year.” In other words, if it is a trifling sum, “a sum substantially the sum alleged.” I will strike out “there was a substantial sum of money.” It will read: “It is sufficient if the Government proves that in addition to the income which the defendant himself reported on his income tax return, the defendant Ormont received as income substantially the sum alleged as taxable income during 1944.”

Mr. Strong: Suppose it was alleged that he received as income an additional million dollars, and we prove a thousand dollars, it would be substantial.

The Court: Insofar as this case is concerned, there is not that variance. Either the defendant received the amount alleged, or substantially that sum, or he didn't receive any sum. He either got it or he didn't during that year.

In other words, on line 26 I strike out, “Even if the Government were to establish only that the defendant Ormont met taxable income was substantially in excess of \$12,174.57, which he reported, it would be sufficient proof as to that count.”

I think I can strike that sentence out. It is repetitious as well.

Mr. Robnett: It wouldn't be consistent.

The Court: Otherwise I think that instruction No. 1 fully and fairly states the charge of Count 1.

Mr. Robnett: Yes, I believe so. [1386]

The Court: Then I will go to Government's proposed instruction 2.

Mr. Robnett: 2 and 3 are out, because of the Counts being out.

The Court: No, Instruction 2 relates to Himmelfarb.

Mr. Robnett: I am sorry, your Honor.

The Court: Strike out "and the succeeding Counts in the indictment, it is not necessary for the Government to establish that the true net income of the defendant was the precise sum which it alleges in the indictment, and it is enough for the purposes of this case if the Government establishes that the true taxable income of the defendant Himmelfarb for the year 1944 was a substantial sum in excess of that which he reported in his return."

Mr. Robnett: The words stricken out on line 22 were what?

The Court: "and the succeeding Counts in the indictment."

Mr. Robnett: "as well as Count 1" should be stricken,—the preceding words.

The Court: No.

Mr. Katz: It should be "as in Count 1."

The Court: "as in Count 1." I will strike out, and say "Again as to this Count,"—we will go back to 5, line 17: "The charge against each of the defendants in each of the Counts contains in the main two elements."

Mr. Robnett: Mr. Strong suggested leaving that out, if [1387] you put in one.

Mr. Strong: I changed my mind.

The Court: "This the charge against each defendant in the applicable count consists of two elements: First, whether the defendant named in the Count." Strike out "as owing a tax."

Mr. Robnett: They are both named in each of those Counts.

The Court: They are out.

Mr. Robnett: They are actually on the face of the indictment named though. I think if we strike it, specifying Ormont as to Count 1——

The Court: Whether the defendant Ormont, as to Count 1, and the defendant Himmelfarb, as to Count 2, did, in fact do the things charged, and, second, whether in each instance he did——

That paragraph would read now: "Thus," and it will follow instructions 1 and 2, as I have indicated: "Thus the charge against each of the defendants in the applicable Counts consist of two elements: First, whether the defendant Ormont, as to Count 1, and the defendant Himmelfarb, as to Count 2, did, in fact, do the things charged, beyond a reasonable doubt, and if so, whether in each instance, if he did them, in each instance beyond a reasonable doubt, he did them wilfully, as that term will be defined to you."

Mr. Robnett: The rest of it is out? [1388]

The Court: Yes, without repeating all of these things in the indictment did he do it, and did he do it wilfully?

Mr. Katz: If the Court please, doesn't that leave out one element in this respect: Let us assume that the defendant attempted to evade his income tax,

but doesn't do it wilfully. Let us assume at the time he attempts so to do and does such wilfully, when in fact he owes no tax——

The Court: He can't attempt to do anything wilfully if he doesn't owe any tax.

Mr. Robnett: I think that is covered by another instruction.

The Court: Because whether or not the defendant did, in fact, do the things charged, that is the attempt.

Mr. Katz: I think it is probably good. [1389]

The Court: All right. Now Instruction No. 5——

Mr. Strong: Do you define wilfully at this point?

The Court: No, I will define this later.

Mr. Strong: Because all this in effect follows and discusses what wilfully is after you define it.

Mr. Robnett: I think the balance of that is covered by your wilfullness instruction.

The Court: I do not want to give any illustrations.

Mr. Strong: You can tell them to disregard your comments.

The Court: I know, but I tried a case before Judge Cosgrave as District Attorney and he illustrated everything and there was a reversal on the case just because of his illustrations.

Mr. Strong: May I argue illustrations? Any objection to that?

The Court: That is argument, that is not instructions.

Mr. Katz: That part is out then, starting with line 26?

The Court: And that from line 6 to 11 is repetition, on page 2, so that will be out.

Mr. Strong: How about lines 2 to 5? There is testimony here as to the defendant Ormont saying various things.

The Court: I think that that could better be covered by the proffered instruction of the defendant about other offenses. [1390]

Mr. Strong: All right.

The Court: Now your No. 6.

Mr. Katz: No. 6 does not appear to be a correct statement of the law, if the Court please.

Mr. Strong: It is taken from another case which was upheld, and certiorari denied.

Mr. Robnett: Not as to income.

Mr. Strong: It was an income tax case.

Mr. Robnett: Not in this circuit.

Mr. Katz: It does not appear to be a correct statement of the law.

Mr. Strong: If the defendants don't want any instruction on avoidance versus evasion, that is satisfactory to me.

Mr. Katz: Instruction No. 6 uses the word "avoid" which was specifically held, I believe, in the Nickala case, to be proper provided it is not done by unlawful means.

Mr. Strong: That is all this says, your Honor.

Mr. Katz: To use a device or strategy to avoid a tax if not by unlawful means is perfectly proper

and the Nickala case, if I recall it, is a case that goes into that matter.

The Court: What is your instruction on avoidance? Where is that here? I saw one here that looked pretty good.

Mr. Katz: I think I submitted one on the matter of avoidance. My Instruction No. 43 goes to that.

The Court: I can take that and modify it.

Mr. Katz: No. 40 is a general instruction on that phase, too.

The Court: I passed that up.

Mr. Katz: That No. 40, if the Court please, is the one that goes into the matter.

Mr. Strong: That is not the law, your Honor.

The Court: Here is the Nickala case: "You are instructed that every person may use all lawful means to avoid the payment of income taxes and that the avoidance of income tax by any lawful means does not constitute a criminal offense. It is an offense, however, to wilfully evade or attempt to evade the payment of such taxes."

Now I think the word "evade" should be defined. I think I can use the word "avoid" there in view of what I have just stated, "to avoid by artifice."

Mr. Katz: The addition "to avoid by artifice," yes, but just to avoid without anything further I do not believe is proper.

The Court: The first sentence can come out here. "Evasion means you avoid by some device or strategy or concealment or intentional withholding some

fact which ought, in good faith, to be communicated."

Mr. Katz: Are you on No. 6 now?

The Court: Yes.

Mr. Katz: How does your read? [1392]

The Court: This is the second sentence.

Mr. Katz: Oh, you have eliminated the first. All right.

That is in the disjunctive, "by some device or strategy or concealment or intentional withholding."

With respect to the matter of device or strategy, if it is a lawful device, such as the organization of a corporation or the establishment of a partnership, general or limited, or if it is such a strategy——

The Court: I can straighten this out here.

Mr. Katz: It must be an unlawful device or unlawful strategy.

The Court: "Ought to be in good faith calculated to wilfully reduce his income tax."

Mr. Kosdon: That wouldn't necessarily follow unless the device or strategy was unlawful because most shifts from partnerships to corporations are wilfully done for the purpose of reducing one's taxes. It is intentionally done, but it is lawfully done.

Mr. Katz: As a matter of fact, a partnership will organize a corporation to operate as such to create a new fiscal period for the purpose of getting a lower tax, which is lawful and proper.

Mr. Strong: The motion picture people just did it and there is some grave doubt as to its lawfulness.

Mr. Katz: That situation is one where for each picture [1393] they organized a separate corporation. That isn't the same as where a partnership changes and they actually form a corporation and proceed to operate as such, or where a corporation or some individual may be interested in a corporation or partnership.

The Court: I think the whole matter can be covered by leaving your Instruction No. 43 but terminating it at line 7 after the word "taxes." The rest of it is the usual kicker on there which I do not give.

Do you see what I mean? Strike out the last sentence and I will not give No. 6.

Mr. Katz: Very well.

The Court: I think that covers it.

Now No. 7.

Mr. Strong: Don't you have a general instruction on that?

The Court: Yes.

Mr. Kosdon: Then 7 will be out?

The Court: It is covered I think by my general instruction.

Mr. Katz: No. 8 is objectionable.

The Court: Aider or abetter. There isn't any aiding or abetting here.

Mr. Strong: Both filed a 1945 fiscal year return, both used the same accountant, the same law-

yer and filed almost [1394] precisely the same letters.

The Court: I know, but if they were both charged in each count this would be all right but now they are separately charged.

Mr. Strong: All right.

The Court: That is out then.

Now No. 9 touches the question which has perplexed me a little.

Mr. Katz: That is objectionable, your Honor, in part at least.

The Court: What is your instruction on that about the fiscal year?

By the way, I think maybe the defendant Himmelfarb's No. 7 might well follow the one about avoidance and evasion.

Mr. Strong: I have no objection.

The Court: Your Instruction No. 31 and 32, that is, Himmelfarb's 31 and 32, I have here. Let me see what Ormont had to say about that.

Mr. Katz: No. 31 I think is similar to theirs. Which one of those two are you giving?

The Court: What I am looking for now is the defendant Ormont's proposed instructions on the same motion so that I can get your three instructions together here.

Mr. Katz: I have a slight objection to Mr. Ormont's instruction as being incorrectly worded.

The Court: By the way, here is one of the defendant Ormont's instructions that I think I can give following this other one. It is a negative instruction. "You are instructed if you find from

the evidence that the defendant Sam Ormont may be guilty of any other crime or wrongdoing not connected with the offense of willfully, knowingly, unlawfully and feloniously attempting to defeat and evade a large part of the income tax due and owing by said Sam Ormont to the United States for the year set forth, that in that event you cannot and must not take into consideration any different or other offense or offenses than that the defendant may have committed. You must find the defendant not guilty unless you find from the evidence beyond a reasonable doubt"—well, that is a kicker. But up to that point I think that that ought to be given. And instead of just "Ormont" it should read, "if you find from the evidence that the defendants or either of them may be guilty of any other crime."

Mr. Katz: I hadn't submitted such an instruction for the reason that the record is free as to Himmelfarb of any of the evidence indicating any other crime. Of course I am faced with the proposition that they may consider it.

The Court: I think it had better be given then.

Mr. Strong: I think the last part of the instruction should read, however, that you may take that into account in determining whether they willfully acted as charged. [1396]

Mr. Katz: That I would be opposed to because then it assumes that there is some evidence as against Himmelfarb on that issue.

Mr. Strong: Or you can add a comma at the

end of the sentence and say, "except with reference to the element of willfulness."

The Court: I think that is correct. Adding to line 11, "except as to the element of willfulness with relation to the charge in this case only," and leaving in your kicker in this case because it points up the proposition that they are only trying them in this case.

Very well. That will be given as modified.

Now I believe I have segregated the three proposals here with relation to books. I think I can give Himmelfarb's No. 32 first in this connection.

Mr. Strong: That is all right.

The Court: I thought I had Ormont's instruction on the books here, but I do not find it.

Mr. Kosdon: Is this it?

The Court: "Books need not be formal!"

Mr. Kosdon: Yes.

The Court: What I was trying to get at was the subject matter of Government's Exhibit No. 9.

Mr. Kosdon: This is the one, I think.

Mr. Strong: These two I think deal with the fiscal year. [1397]

Mr. Katz: No. 31 deals with the fiscal year period on Himmelfarb but it doesn't go into the matter of books or records.

The Court: It is X-5.

Mr. Katz: I think that X-5 corresponds to Himmelfarb's No. 31.

The Court: I have that. It is the same thing?

Mr. Katz: Yes.

The Court: It is identical?

Mr. Katz: Now there is a change. May I point out what I deem to be an error in X-5 which I tried to correct in mine?

The Court: Before you go to X-5, have you Himmelfarb's Vol. 12?

Mr. Strong: Yes.

The Court: I will give that as the opening stanza on this.

Mr. Katz: Now on X-5, getting down to the last line: "persons constituting such partnership or joint venture are not required to pay for the income of such partnership or joint venture until the 15th day of March of the calendar year following the last day of such fiscal year period." That is incorrect. It is the 15th day of March of the calendar year following the calendar year in which the fiscal period ends. [1938]

In other words, if the fiscal period ends on September 1, 1945, it is payable on March 15 of the calendar year following the calendar year 1945, or 1946.

I believe I corrected that by stating it that way, that it is in the calendar year following the calendar year in which the fiscal return was made. That is correct, I believe.

Mr. Houston: Yes. We had two instructions on that matter which covered the matter as to which year it was to be paid in but specifically setting forth the date when it would be due.

Mr. Strong: We object to X-5, your Honor. First of all, it doesn't state the full substance of what is in issue. Secondly, the way it is phrased they

may just elect. It disregards the fact that there are certain requirements which precede such an election or choice. One of them is the keeping of books and records of a certain type and that they cannot elect in the event they do not keep them.

The Court: Let me see. Your instruction struck me as a little bit awkward. I mean it gets down to the point finally but I think it is confusing to the jury. In other words, they determine whether the Acme Meat Company and whether the additional \$71,000 was actually received by them as part of the transactions carried on as the Acme Meat Company. Well, I don't know, I think probably that is in the case.

Mr. Strong: That is the main question. [1399]

Mr. Katz: There is this objection to No. 9, if the Court please, which I have. First, starting at line 8, "In this connection you may take into account the evidence which is in the record which tends to show where the \$71,000 came from." There is no such evidence in the record as against the defendant Himmelfarb.

Then "what enterprises if any the defendants engaged in besides the operations shown as the Acme Meat Company," there is no evidence in the record that the defendant Himmelfarb——

The Court: Yes, there is.

Mr. Katz: As to what?

The Court: If nothing else, there is the joint return and then there is the testimony from Ormont, his statements to the agent about where he got it, so while that testimony is not applicable to

Himmelfarb the jury can draw an inference from where the testimony shows that Ormont got that Himmelfarb got it from the same place.

Mr. Katz: I don't understand, if the Court please, that evidence that is in the record solely and exclusively against Ormont can be used in the determination of Himmelfarb's case as to what the evidence is in his case. [1400]

The Court: They were doing business together. They did file the joint return. There is clear, positive evidence of that.

Mr. Katz: There was a joint return.

The Court: That is a proven fact.

Mr. Katz: Yes.

The Court: There is evidence in the record, as to Sam Ormont, as to what he was. There isn't anything directly against Himmelfarb, but the jury can certainly draw the inference.

Mr. Katz: Not by going into the evidence against Ormont.

The Court: I think they can, from the testimony of Sam Ormont, as to the source of that income, because it is a proven fact. And they can, from that fact, by virtue of the other proven facts, that they signed a joint return, in fact, that it came from some source. The first proven fact is the joint return.

Mr. Katz: The next one we referred to, if they accept as a proven fact what Ormont got.

The Court: On the joint return it says they are doing business as Acme Meat Company.

Mr. Katz: No reference to the Acme Meat Company.

Mr. Strong: It doesn't say Acme Meat Company. It says: "Miscellaneous Enterprises together." There is another point, your Honor, which is mentioned, that both defendants went to [1401] the same lawyer; he filed the return, and went to the same accountant.

The Court: There is evidence that the defendant Himmelfarb was at the plant when they went down to interview him before the expiration of the fiscal year. There is testimony of some witness that he saw Himmelfarb down there.

Mr. Katz: Let us go back to Instruction No. 9.

The Court: No. 31, down to the first sentence, is a more correct statement than 45.

Mr. Katz: Yes.

The Court: So I will get rid of X-5. I think, therefore, on your No. 31, I can give the instruction down to the sentence on line 12. From there on I think the Government instructions should be given, No. 9.

Mr. Katz: If the Court please, I have not completed my objections to No. 9.

The Court: All right.

Mr. Katz: It refers to taking into account of evidence which is stated as a matter of fact, in this, that it is in the record, and that the defendants engaged in, besides the operation, known as the Acme Meat Company. There isn't any evidence in the record as against the defendant Himmelfarb

that he engaged in the business of the Acme Meat Company.

Mr. Strong: It shows that he was a partner.

The Court: Yes, there is testimony that they held [1402] themselves out as partners. There is the insurance policy.

Mr. Katz: There is the insurance policy, that's right. There is also testimony from Mr. Link, the only evidence applicable, by Link.

The Court: It is to your own advantage if he was doing business as Acme Meat Company. The Acme Meat Company kept records.

Let me see. "In this connection it is a part of your functions to decide whether the defendants actually had some income producing enterprise, or enterprises,"—I think that sentence can be cut out.

Mr. Strong: It is our position that they did not have any separate enterprises.

The Court: Lines 5 to 8.

Mr. Strong: They had some income producing enterprise, which they reported on a fiscal year basis. That refers to what there was reported. It says: Miscellaneous enterprises. That was reported separate and apart.

The Court: "what enterprise, if any, the defendants engaged in besides the operation known as the Acme Meat Company," that assumes they did engage in an operation known as the Acme Meat Company.

Mr. Strong: The evidence shows it.

The Court: The jury has got to decide this.

Mr. Katz: That was my objection. [1403]

The Court: "what enterprise, if any, the defendants engaged in besides the operation known as the Acme Meat Company,"—before they decide they were engaged together in the Acme Meat Company they must decide not only then whether they in fact received it, and whether they kept books on that transaction.

They decide whether or not they did engage in this enterprise, but the turning point is whether or not they kept books as required by the statute, so as to permit them to file.

Mr. Kosdon: I don't believe 145 (b) makes it an offense.

The Court: I am not concerned whether it makes it an offense to keep books, or not to keep books; but it is material here, because if it was an enterprise other than the Acme Meat Company, then, in order for the law to determine whether they could or could not file on a fiscal year basis—that is determined by whether or not they kept books; and if they did not keep books, they were not entitled to file on a fiscal year basis. If they did keep books on that extra enterprise, then they were entitled to file on a fiscal year basis.

Mr. Katz: I think this last instruction, as it is being modified by your Honor, will require the giving of the instructions that I have requested, that if the election of the fiscal year was done through error, ignorance of the law, misunderstanding, then they would not be guilty of an offense.

The Court: Here will be the instruction then: I will give 32. We have settled that on the joint venture, or [1404] partnership. Then the first sentence of 31. Then the Government's No. 9, as modified, and then Government's No. 10. I will give Government's No. 9, and then your instruction in regard to the books.

Mr. Robnett: I want all of that.

The Court: You want the whole instruction?

Mr. Robnett: Yes.

The Court: Then the Government's No. 10.

Mr. Katz: In connection with No. 9, I want to know whether 33 should not be given by reason of the modification in No. 9, and Himmelfarb's No. 33.

The Court: What is that?

Mr. Katz: I am asking the Court now to consider Himmelfarb's No. 33, in view of the modification.

The Court: I will add one other modification to No. 9. I have added, after line 21, the following: "and if not, then whether or not books and records were kept of such other enterprise as required by the statute, and in this connection I now instruct you that the law relating to such, and such books need not be filed. Then Government's No. 9.

Mr. Robnett: That is the only modification of 9, is it?

The Court: No, on line 12, after "Acme Meat Company,"—"if you decide they were engaged together in the Acme Meat Company."

Mr. Robnett: Your Honor, it seems to me that 9 is a [1405] confusion instruction.

The Court: That is what I thought about it at first.

Mr. Robnett: Starting with line 8 you tell them **they may consider this in connection**—"you may take into account the evidence which is in the record which tends to show where that \$71,000.00 came from, what enterprise, if any, the defendants engaged in besides the operation known as the Acme Meat Company."

The Court: If you decide they were engaged together in the Acme Meat Company.

Mr. Robnett: "and whether the additional \$71,000.00 was actually received by them as part of the transactions carried on as the Acme Meat Company, or whether the money was received as income with reference to some other transaction not part of the Acme Meat Company."

I think it is putting a negative in there, practically requiring us to prove a negative, namely, that we must prove that it was not from the Acme Meat Company, and was not a part of the Acme Meat Company, whereas the burden of proof is upon the Government to prove that it was not a joint venture.

The Court: No, the Government's position is that it was a joint venture, but it was not one which they could use a fiscal year basis on.

Mr. Robnett: That would be because of lack of books.

The Court: The Government accepted it, I understand. [1406]

Mr. Strong: No.

The Court: You don't accept the fact that it was a joint venture?

Mr. Robnett: I want to make an exception to the giving of any part of No. 9, on the ground that it is confusing, and that it is pointing out evidence by saying it tends to prove given things, that are not proven, and it tells the jury there is evidence in the record that tends to prove those things. Particularly, as to the \$71,000.00, as to where it came from, and that it puts the burden upon the defendant to show a separate enterprise from the Acme Meat Company, whereas there is a serious question of whether these two defendants were engaged as the Acme Meat Company.

The proof would tend the other way, that they were not; and Mr. Himmelfarb was merely an employee of the Acme Meat Company, and was not engaged in its operation, or getting income, that is, part of the Acme Meat Company's income. He was being paid a salary. And it is confusing from that point of view.

The Court: I don't think so. If it were I would agree with you, but I think with the changes I have made, that that is a question for the jury.

Mr. Katz: May I say, with respect to the defendant Himmelfarb, that the manner in which the statement here is made, as to what the evidence tends to prove, being a statement [1407] by the Court in the instruction, the net result is that the inference is as indicated, or may be so drawn.

The Court: If I thought that were true, I would not give it, but reading the instruction, I don't see it.

The Court: That is what I thought about it at first.

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The Court: If I thought that were true, I would not give it, but reading the instruction, I don't see it.

Mr. Katz: Don't you do that, when you say, "In this connection you may take into account the evidence which is in the record which tends to show where the \$71,000 came from?"

Mr. Strong: May I make this suggestion?

The Court: Yes.

Mr. Strong: "May take into account whatever evidence may be in the record which tends to show."

The Court: "May take into account the evidence which is in the record concerning." Strike out "which tends to show."

Mr. Robnett: Isn't that pointing out to the jury some specific kind and character of evidence, whereas, in truth and in fact, they should not be told about that, because they are, under one instruction told that they must follow the law, and that they must try the case solely on the evidence. Here you are pointing out the evidence in a specific case, which emphasizes it.

Mr. Strong: It refers to the fiscal return.

Mr. Robnett: It goes much further than that, if your Honor please. It indicates that the Acme Meat Company had sales and operations, and that is not defined. It would indicate they might have had income from things besides sales. I [1408] think that it goes into something which brings the Acme Meat Company into this, in the instruction.

Mr. Strong: It is in the case already.

Mr. Robnett: There is evidence that there is an Acme Meat Company. You say, if they were engaged in anything besides the Acme Meat Company.

The Court: "In this case you must determine what enterprises, if any, the defendants were engaged in, besides the operation known as the Acme Meat Company, if you decide they were engaged together, and whether—" I strike out line 9. It will read "In this connection you must determine what enterprise, if any, it came from, and whether the \$71,000.00 reported on that return was received by them as part of the transactions carried on as the Acme Meat Company." I think with that modification it will stand. [1409]

The Court: Very well. We will go to the next one now, No. 11. I think that is covered.

Concealment of facts, that is too argumentative, I think, Mr. Strong. That is No. 12.

Mr. Katz: No. 11 is out?

The Court: Yes.

I think your No. 12, the last sentence is the only thing that should go in. "In order for you to find that sums received by the defendants during any of the taxable years constituted income to them, it is not necessary for the government to prove the exact source of that income."

Mr. Strong: I did not understand the defendants were objecting to No. 12.

Mr. Robnett: Yes, we just reached it.

Mr. Strong: All right.

Mr. Katz: Now with respect to 12, what is in it?

The Court: The last paragraph: "In order for you to find that sums received by the defendants during any of the taxable years constituted income

to them, it is not necessary for the government to prove the exact source of that income."

Mr. Katz: What is that, out?

The Court: That is in, but the rest of it is out.

Mr. Katz: We only have one taxable year here.

The Court: That is right, one year. During that taxable year 1944. [1410]

Mr. Katz: Now there is one other thing. "In order for you to find that the sums received by the defendants during the taxable year constituted income to them," that is true——

Mr. Strong: To each of them.

The Court: Very well. 12(a), that is out.

Mr. Strong: That is the reverse. It has the reverse on the bottom there. I think you gave such an instruction in the last jury case that I tried before your Honor.

The Court: I have one general instruction that I give, after all reasonable doubt if they find on the other hand that they are guilty beyond a reasonable doubt then it is their duty to find a verdict for the government.

Now as to the defendant Ormont taking the witness stand, I have the one instruction where a defendant takes the stand and is entitled to a general instruction, which I think covers that.

No. 13 is out.

Now let us take the other instructions of the defendants. On Ormont's instruction, "You are instructed that a taxpayer on a cash basis need not report any income on his return that may be due

him until he actually receives the case," I do not see what that has to do with this case.

Mr. Strong: That is as to 1943 anyway.

Mr. Kosdon: There was evidence in the case that some of the money paid in 1944 wasn't paid instantly, you might [1411] say, but was paid some time later. Some of these people came back and paid later.

Mr. Strong: We don't charge the defendant with that.

Mr. Robnett: Yes, you do. At this point your Honor let the evidence in as to all those years for the purpose of showing intent, that is, to show intent to violate.

The Court: All right. He receives it when he gets it in the bank. I do not think it is necessary to define receives. It is when he has dominion or control over it.

Mr. Strong: Your Honor, if I may suggest, there was quite some discussion and your Honor might have indicated by the rulings that there would be some doubt as to whether he receives it when he gets it actually or when it is deposited in his bank or to his account with Merrill, Lynch, Pierce, Fenner & Beane.

The Court: I have several thoughts in that connection. Every lawyer, for instance, unless they have a bookkeeper to keep track of things, gets large sums of money and instead of opening it to the client's trust account or part fees or part costs, and so forth, they will put it through their own account, but a lot of that is the client's money.

Mr. Strong: I will argue that point so it won't be necessary to give it.

The Court: Because money is deposited in a bank doesn't mean it belongs to them. [1412]

Then the next one, the law presumes the acts of all men have been properly performed.

Mr. Strong: I thought there was a presumption of innocence but I didn't know there was a presumption that attaches legality to any act.

Mr. Katz: There is such a presumption.

The Court: Yes, there is. There is a presumption that the law is obeyed.

Mr. Katz: That is right.

The Court: Which is a presumption of innocence that a man doesn't disobey the law. I think the presumption of innocence covers that.

The next one, any witness in the case who is influenced or induced to become a witness, that is harmless. If you want it, I will give it.

Mr. Kosdon: We would like it.

The Court: Then the next one, United States government bonds bearing two different persons' names as co-owners are presumed by law to be equally owned by each person whose name is ascribed thereon * * *

Mr. Strong: What that says in effect is that if you have your name on a bond, whether it is alone or with somebody else's, it is your bond, but the question isn't whose bond it is but whose money paid for it.

The Court: Then there comes into play the question of [1413] the defeat and evasion of the gift tax,

because if in a year he bought \$50,000 worth of bonds, and gave \$25,000 worth of them to his mother, or half of them to his mother, then he would have to pay a gift tax. He is not charged, however, with evading the gift tax.

Mr. Kosdon: No, your Honor. It is completely a separate and distinct return.

Mr. Strong: I think there is a line on the return.

Mr. Katz: No. There are separate returns and separate taxes.

Mr. Kosdon: There are separate amounts involving depending on the family relationship, and so forth.

Mr. Strong: To save time I won't object to it because I don't think it means anything.

The Court: The next one, gifts do not constitute income, I still cannot see how that enters into this case.

Mr. Robnett: There is some evidence there from which it might be argued that many of these things were gifts. People came in and left money and were not buying anything from him. What is it, lost and found or a gift?

The Court: You mean if they just bought something from him?

Mr. Robnett: They come in days after, they had already paid their bill and they come in days after and give him money. [1414]

Mr. Kosdon: As a matter of fact, the evidence is to the effect that the transactions by the Acme

Meat Company were on an accounts receivable basis rather than a cash basis, with a few exceptions.

Mr. Strong: Then we should take out the instruction dealing with the cash basis.

Mr. Katz: They are referring to cash or credit with respect to sales.

Mr. Strong: There isn't any evidence from the defendants on the defendants' part or any of their witnesses as to what this money was, gifts or anything else.

The Court: You may have an exception.

Mr. Robnett: We would like an exception on the ground that it is not covered by any other instructions and it truly states the law and that there is evidence in the record that would justify the giving of the same.

Mr. Strong: May I look at those?

Mr. Robnett: There is no proof by the government that all of the money that they claim or any particular portion of it was income.

Mr. Strong: I will withdraw my objection to X-10.

The Court: X-11 is the definition of a gift.

Mr. Strong: I will withdraw my objection to both of them.

The Court: I will give X-11 first and then X-10, or [1415] either way.

Now the next one, relative to declaration of estimated tax, in view of the fact that there is some evidence in there about the estimates, I will let those stay.

This one here I will modify to this extent—

Mr. Strong: If your Honor gives that, I would like to have your Honor reconsider my instruction on that. If the instruction is to be given on the basis of what the defendants are to be found not guilty, then I think there should be an instruction as to what the basis is on which they should be found guilty, and that is my instruction No. 12-a. Also my instruction No. 13.

The Court: But this. "If you find that he paid all or a substantial part of the income due and owing * * * for the calendar year 1944, you must find the defendant Sam Ormont not guilty."

Mr. Strong: There is another objection. It says, "If you find that he paid." Paid what? Paid today or on a date when he had to file the return? That is the point.

Mr. Kosdon: Paid at the time he had to file his return.

Mr. Strong: But all the evidence put in by the defendants is intended to establish that he paid it some time or other, some other date.

Mr. Robnett: No, it shows when he paid it.

Mr. Katz: I have a similar instruction that takes the [1416] attitude that it goes directly to one of the elements of the offense. If the tax has been paid there is no offense.

Mr. Strong: That is not the law. The tax was paid when it had to be paid, then there is no offense.

The Court: No, I do not think that instruction should be given. I will make this one X-10.

Mr. Robnett: We except to that on the ground

that that is a statement of the law and is not covered by any other instruction.

The Court: Now the next one, I think that can be given. It is just a summary.

Mr. Strong: May we add to that?

The Court: Just a moment. I may add your No. 12.

Now let me get the same one for the defendant Himmelfarb. That is your No. 26. Himmelfarb's No. 26 I will give and government's 13 except lines 10 to 13.

Mr. Katz: If the Court please, which one are you referring to now?

The Court: I am giving your No. 26 as written.

Mr. Katz: With respect to 26, my attention has been called to the fact that the word "substantial" was omitted and which should have been in there. "any substantial part of the income tax due." That is at line 5. Also at line 14, "any substantial part."

The Court: Very well. [1417]

"To establish its case, the government must prove not only an attempt by the defendants willfully to defraud it, but also that a tax in addition to what the defendants had already paid remains due and owing."

I will mark that No. X-12. And you except to it on the ground that that is the law and is not covered by any other instruction?

Mr. Robnett: Thank you. That is our exception.

The Court: The next one, that it doesn't make it a crime for the defendant to conceal——

Mr. Strong: The law makes it a crime for any person required who willfully fails to collect or truthfully account for. Truthfully account for, the reverse of truthfully accounting for is concealment.

Mr. Robnett: No.

Mr. Kosdon: Not at all.

Mr. Katz: You can account for it and still conceal the source from which it came.

Mr. Strong: It doesn't say anything about source.

Mr. Robnett: That's just it, it doesn't say anything about source in there.

Mr. Strong: This is your instruction we are talking about.

Mr. Robnett: That is the way I understood it.

The Court: Does not make it a crime for the defendant [1418] taxpayer to conceal or fail to disclose the source or sources of income."

That section doesn't, but some other section of the law does.

Mr. Katz: We are not charge with it in this case.

Mr. Strong: Then why bring it up? This is your instruction.

Mr. Kosdon: It is part of your indictment which specifically sets for that.

Mr. Katz: The court held that that was surplusage, that that doesn't state an offense in so far as the concealing was concerned.

The Court: I will give that and I will give it up here in the correct order.

Now this other one here, I don't know what number it is, that I think is covered sufficiently by the other instructions.

Mr. Robnett: Yes, I think the one Mr. Katz has covers it.

The Court: This one likewise is covered generally by the other instructions which are given on the subject.

Mr. Robnett: Is that all?

Mr. Strong: That is all of yours.

The Court: Then we have these instructions of the defendant Himmelfarb. Evidence of a defendant's good character is [1419] in the same category as other facts and may create a reasonable doubt. That is all right. That is your No. 15.

No. 17 I think is covered by willfulness.

Mr. Katz: I thought that one was the one that your Honor felt was covered by the instruction as to presumption of innocence.

The Court: And willfulness. I think the subject matter is sufficiently and correctly covered.

Do you wish to except on the ground that 17 is the law and is not covered?

Mr. Katz: I do so except, your Honor.

The Court: No. 22 is covered by your instruction No. 26.

No. 23 is covered by your instruction No. 26.

No. 26 covers the basis upon which he is to be found not guilty.

Mr. Katz: If the Court please, the matter of 26 refers to the joint matter of evading or attempting to evade. No. 22 refers to the matter of the return being false or fraudulent, and it touches one of the specific allegations in the indictment. I believe No. 22 to be a correct statement of the law. I do not believe it to be covered by instruction No. 26, or any other instruction, and I make the exception on that ground. [1420]

Mr. Strong: No. 23 deals with a misdemeanor, your Honor.

The Court: He is talking about 22 now. I think your No. 26 covers it sufficiently because the crime is attempting to defeat and evade by filing a false return. In other words, I cannot instruct on each piece of evidence.

Your No. 27 is declined. Do you except on the ground it is the law?

Mr. Katz: Yes, I do, and it isn't covered.

I wish also to note the same exception with reference to No. 25, on the ground that the general instruction on willfulness does not necessarily cover the matter of mistake, ignorance and that we are entitled to a specific instruction with respect to mistake and ignorance, and I make the exception upon that ground, that no instruction covers it.

The Court: Very well.

Failure of a defendant to testify I will give, your No. 44.

And your No. 45 I will give.

Mr. Katz: May I note the same exception with respect to requested Instruction 29 and 30, which

go into the matters of mistake and ignorance, negligence and carelessness, as being proper statements of the law and not covered by any other instructions?

The Court: Very well. The exception is overruled.

I will give your No. 46. [1421]

Mr. Katz: Your Honor has given 31, I believe, and has given 32.

Mr. Strong: As to 46 there is another one that is from the California jury instructions.

The Court: Yes, this is copied from it.

Mr. Katz: Is your Honor giving No. 35?

Mr. Strong: That is covered by willfulness.

The Court: No.

Mr. Katz: I believe we are entitled to a specific instruction with respect to the belief of the defendant as to when his tax is due and payable. It isn't covered by any other instruction and I believe it to be a correct statement of the law. I ask that an exception be noted.

The Court: Very well.

Mr. Robnett: May I inquire? I understand 12-a of the Government's was out. Is it still out?

The Court: No, I am giving it. I am giving your instruction and then following it with that, except the second paragraph.

Mr. Robnett: I wish to except to 12-a on the ground that it is not a correct statement of the law, that the filing of a return must be false and fraudulent as well.

Mr. Strong: That is covered by the correspond-

ing defendant's instruction which tells the jury to bring in a verdict of not guilty. [1422]

The Court: A false and fraudulent return, I think that is correct. I will add that.

Mr. Robnett: As to the willfulness instruction that your Honor said he was giving, the wording of that as it would apply in this case as it now stands, separate defendants and separate counts, I believe is a little ambiguous. It says, "and when you have considered all of the acts of the parties."

The Court: Yes, when you have considered all of the acts of each defendant.

Mr. Robnett: Couldn't they consider the acts of one defendant as finding the other defendant willful? I don't think they can do that.

Secondly, "and their relation to each other," the relation of the parties or the relation of the facts?

Then "the circumstances under which they were done," I suppose that "they" refers to the acts.

The Court: When you have considered all of the acts of the parties. When I say "the parties" I mean the Government as well. So I will leave it "the parties." That is, the acts of the Government with relation to their conversation, and so forth and so on. I do not know how I can make it any more comprehensive.

Mr. Robnett: The willfulness is the willfulness of the defendants in the alleged offense. [1423]

The Court: That is correct, but when you consider the act of the Government in its conduct towards the defendants then you decide whether or not the defendants' conduct was willful.

Mr. Robnett: I see.

Then at the last you have, "from all of these you will determine whether or not any act, if done by the defendant was beyond a reasonable doubt done willfully"—just any act? There are lots of acts that they have done, even if they were willful they still wouldn't make them guilty of an offense. It would indicate there that if they find any act was willful that then the willfulness is established in this case.

Mr. Strong: It doesn't say that at all. It discusses willfulness and it specifically makes willfulness an element of every material fact and act.

Mr. Katz: The act should relate to the matter of their income tax return and not to any other willful acts that were not willful acts.

The Court: Any act charged in the indictment.

Mr. Strong: Or constituting an element of an act charged in the indictment.

The Court: Any of the acts charged in the indictment, if done by the defendants was beyond a reasonable doubt done willfully.

Mr. Katz: That limits it to the acts charged in the indictment. [1424]

The Court: That is the attempt to evade and defeat. That is the point.

Mr. Katz: If it is limited that way, that clarifies it.

Mr. Strong: I just want to make the record show that this limitation on the use of the term "willfulness" with relation to acts has come solely

from the defendants and not from the Government, at their request.

The Court: I understand.

Mr. Robnett: Now, your Honor—I don't believe since we were here last night this has come up—will your Honor please give an instruction to the jury that any evidence in the record as to matters pertaining to 1942 or 1943 as to Samuel Ormont are to be considered for the sole purpose of finding willfulness or intent?

The Court: Yes, I will give such an instruction. Will you draw it and submit it?

Mr. Robnett: We will draw it and submit it.

The Court: Either one of you.

On the general instructions, there is nothing peculiarly different in the way a jury is to consider the proof, I suppose you have read that?

Any act or thing done by the judge * * *

Duty of the jury to consult one another * * *

Mr. Strong: I am satisfied. [1425]

The Court: In other words, after I give the opening general instructions, and then these specific instruction, I follow with a series of closing general instructions.

Mr. Katz: One thing I would like to touch upon, if the Court please, and that is this: I don't like to ever have an occasion to interrupt counsel in the making of an argument, and I want to avoid that if I can. That is the reason I mention it. Counsel do not like to be interrupted, and particularly to get into any discussion with respect to the matter of an objection.

Now I am assuming that Mr. Strong in his argument to the jury with respect to the defendant Himmelfarb will not reach over into and apply to Himmelfarb any evidence that came in with respect to Ormont.

Mr. Strong: I think that that is an assumption that doesn't even have to be stated, your Honor.

Mr. Katz: On the other hand, I want to clarify the matter as to the right to apply that evidence by way of going to it, to use it to draw inferences or deductions therefrom.

The Court: Well, we cannot settle the argument in advance. We have to wait until that comes.

Mr. Katz: Except that your Honor has made some indication with reference to it.

Mr. Strong: But, your Honor, may I say this, just so that we don't have too much interruptions, if Mr. Katz is [1426] minded to interrupt, that I do intend to refer to every material physical fact with reference to the defendant Himmelfarb, including when he went to the lawyer, who he went to from there, and everything else that is in evidence.

The Court: It is only the instructions we can settle in advance, not the argument.

Mr. Strong: When do we come back?

The Court: 2:00 o'clock.

(Whereupon, at 12:45 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same date.)

Los Angeles, California, Thursday, June 12, 1947
2:00 p.m.

The Court: United States vs. Ormont and Himmelfarb.

Mr. Strong: Ready.

The Court: The usual stipulation?

Mr. Strong: Yes.

Mr. Robnett: So stipulated.

Mr. Katz: So stipulated.

The Court: There were some exhibits that were stricken from the record. What were those numbers?

Mr. Katz: 36 B and C and 32.

The Court: 36 B and C were records of the bank accounts of the defendant Himmelfarb before 1944 and after 1944. No. 32 was a deposit slip of the defendant Phillip Himmelfarb.

The case is now pending as against the defendant Sam Ormont as to Count 1 only, and as to the defendant Phillip Himmelfarb as to Count 2 only.

Counts 3 and 4, those relating to the income tax return of the defendant Sam Ormont for the years 1942 and 1943, the Court has given a judgment for the defendant upon motion of his counsel. The evidence in the record, however, which relates to the conduct of the defendant, Sam Ormont, during the years 1942 and 1943, was not stricken from the record, but was left in the record in order for you to determine whether or not there was a specific intent, and whether or not there [1430] was

willfulness, as I shall define "wilfulness" to you, on the part of Sam Ormont to do the things which he is charged with having done in Count 1, which relate to his indictment in 1944; and for that limited purpose only.

I think that clears up the matters which have not been disposed of.

Mr. Robnett: It does, your Honor.

The Court: Mr. Strong.

Opening Argument in Behalf of the Government

Mr. Strong: Your Honor, ladies and gentlemen of the jury, this has been a long trial. I think you know that better than I do. And I for one, and I am sure all the other counsel and his Honor are very grateful for the attention which you have paid, throughout this case, to all of the evidence introduced, and everything that was done.

Now is the time when it becomes my duty to try to place before you something in the nature of an analysis of what went into this record; and you remember when I first started out here I told you that the case was something like a jig saw puzzle. The opening statement made by counsel is for the purpose of giving you a general overall view of what counsel is going to hope to prove to you. It is like the picture on the outside of the box; and then, as the evidence develops, and goes into the record, by way of testimony, or by way of exhibits, those are like the pieces inside the box. [1431]

You will get a lot of pieces. Ultimately you ladies and gentlemen, as the jury, will have the job that will fall to you when we have finished here, of deciding what those pieces mean; which pieces mean anything; which do not; and what they will prove with reference to the indictment as it now stands.

You will also have to decide whether that box contains only pieces which have to do with the particular jigsaw puzzle represented by Counts 1 and 2, or whether there are probably a lot of other pieces that have nothing to do with it. It sometimes happens you will be confused, and there will be a lot of extra pieces that have nothing to do with the case. As we go along I will try to point out to you the various things that went into this picture during the three or four week we have been here, which in my opinion—that is just an opinion, for you to decide—which in my opinion have nothing to do with this case, and that do not have any bearing on whether or not the defendants violated the law, as charged in counts 1 and 2.

I will take those facts up later, but just bear in mind at this time that a lot of things in the record may have nothing to do with the case.

As the case now stands, it is relatively simple. It is simpler than when we started. We at that time had four counts. Now we only have two counts.

Count 1 charges the defendant, Sam Ormont, with having wilfully, knowingly, unlawfully and feloniously, attempted to [1432] defeat and evade a large part of his income tax which was due and

owing by him to the United States of America for the year 1944. All of this deals with the year 1944—by preparing, and causing to be prepared, and filing, and causing to be filed, with the Collector of Internal Revenue, a false and fraudulent income tax return. I will go into the substance of it later, as to what the return says, and what I believe it should have said.

Count 2 deals only with the defendant Himmelfarb, and it is a similar charge as to the defendant Sam Ormont, again for the year 1944, and it charges him in about the same way with reference to his income and his tax.

Now, I am going to take up the case of each defendant separately, since Mr. Ormont is only charged now in Count 1, and will point out to you the various pieces of evidence that I think the jury should consider as to Mr. Ormont alone; and then I will take up Count 2 and the evidence which I will submit to you in support of the indictment as to Count 2 as against Mr. Himmelfarb. And I shall separate those two, and keep them apart as much as humanly possible.

You will understand, of course, that as to what I say about the evidence is not to be accepted by you, but it is just an opinion, an argument on my part, and his Honor will instruct you later on—His Honor will instruct you as to all the law in the case, and when I make some reference to some law or [1433] regulation, and if his Honor should instruct you differently, of course, you will abide by what his Honor says about it, and not what I say about it.

But in my argument to the jury I shall attempt to show you what these things are, how they are material here, and then point out how they tie in with the violations charged in Counts 1 and 2 as they actually occurred.

Taking Mr. Ormont first. Mr. Ormont, you remember, is the gentleman who testified here, so you had a chance to listen to him under oath. You had a chance to observe him, his demeanor, his attitude, his manner, as to answering questions, and what he said in reference to them. That is one thing you should take into consideration, because essentially this case, so far as Mr. Ormont is concerned, deals with an attempt to defeat and evade. That, in effect, is another way of saying that you didn't take the whole thing; you only took part of it. And in determining whether or not that happened as we charged, it is very important that you keep in mind how the defendant himself answered questions.

Was he open? Was he frank? Did you like his answers? Did you like his demeanor on the stand? That is one thing to consider.

The Government's case is not based upon the manner in which he testified. It is based upon much more important evidence; much stronger evidence, which I will try to delineate. [1434]

Basically, what is involved in the consideration of each of these counts is whether the defendant who is named in the particular count, Mr. Ormont in Count 1, and Mr. Himmelfarb in Count 2, did the acts which are charged in the indictment, and

the second important consideration is, did he do them wilfully? That is the important element, as his Honor will tell you.

I will try to point out to you that he did them, and did them wilfully. As to Mr. Himmelfarb, that he did them, as charged in Count 2, and that he did them wilfully.

Mr. Ormont, in Count 1 of his income tax return, states that he reported that his net income was \$12,174.50. There can't be any possible question about the accuracy of that, because you will have before you the income tax return of Mr. Ormont for the year 1944. That is in evidence. You can examine it. You will find that it states so. You will find that the indictment sets forth **how much tax he reported and paid**, and you will find, by examining this return, this amount of tax.

So the basic problem is, did he have any more income that he did not report? Did he have any more income, which he kept from the Collector of Internal Revenue, wilfully, and deliberately, for the purpose of attempting to defeat and evade tax which was due from his income, and which should have included the amount we say he earned in addition. [1435]

The same thing applies of course with reference to Mr. Himmelfarb and his return.

Now what evidence is there in the case which tends to show that Mr. Ormont had income in addition to this \$12,000-odd which he reported in his return? The evidence in substance is this: You have bank records which were introduced in evi-

dence, which you can examine, bank records showing deposits, records showing moneys coming and going. You have the testimony of Mr. Eustice who testified from these records. He has no figures that he gets out of thin air; he gets figures from the records that he testified to you about. His Honor told you that it was mostly opinion testimony. It is what Mr. Eustice summarized from the records that he saw, not only these records which are before you but he also had available, as you remember, the records of the Acme Meat Company, which are not in evidence but which he had available and as to which his Honor permitted him to testify, to say what he found and what he saw and what relation that had.

Then besides the records and Mr. Eustice's testimony from the records, we had the testimony of Mr. Bircher. You will remember Mr. Bircher, he is one of the agents who talked to Mr. Ormont—I think it was on the 24th day of May, if I am not mistaken, 1945—that conversation is before you. We have the testimony of Mr. Phoebus, who was also present at that conversation. Now I am going to go into these conversations [1436] because you will see that they are very important because of what they disclose.

We had the testimony of Mr. Link. We have the testimony of Mr. Smith. We had the testimony of Mr. Gorgerty. You will remember Mr. Gorgerty was the nice little gentleman who sat on the stand here, he was from an insurance company.

And besides all of these witnesses we had Mr. Ormont, and I will show that Mr. Ormont's testimony as it is supports the Government's case without any doubt, that anything Mr. Ormont said and the way he said it is in support of the Government's case. So that we have Mr. Ormont in effect as a witness to show that he had this additional money and that he didn't report the tax as charged.

Mr. Eustice, you will remember, testified that he made an analysis of the money going in and the money coming out, and as you will recall he testified in order to check and make sure as to where that money came from he went back as far as 1931—1931—to check the income of 1944 he checked all the way back to 1931, and he made a careful and complete analysis. And you will remember the cross-examination, three or four days of it, testing every iota of statement that was made by Mr. Eustice, testing him right and left, trying Mr. Eustice, did he remember or didn't he remember, where did he get it, where didn't he get it, asking hypothetical questions, if this was the fact—nothing in the record to show that it [1437] is the fact—but if such-and-such is the fact then you subtracted that from this, and you added that to this, what would you have? And if you took into account this check which I show you and you subtracted that from this, and added this to that, what would you have? And here is a sheet of paper, add to it some figures—I will give you figures to add to it—now take those figures from such a figure, what

have you got? If the moon is made of green cheese, what have you got? The question in this case is, did the defendant have any more income. It isn't based upon any hypothesis of what might have happened if certain facts existed or didn't exist. There is nothing to show that they did exist, nothing to show that any of these supposition questions are based upon anything than what they purport to be, if and assume.

Well, you can assume all kinds of things. You can assume enough figures put together where, if you subtracted it from the amount reported as income and the amount paid as income, the Government will be owing Mr. Ormont money. That is all on suppositions, on assumptions—nothing in the record to show that it happened.

You will remember that after all that questioning and all of these checks that we used to ask him, what about this check, what about that check, did you subtract this one and did you add this one, if you did that what would you have? You will remember I took all those checks and I took each one [1438] and I said to Mr. Eustice, I said, "Now take this check, did you include that amount in the sum which you say is unreported income?" He said, "No, sir."

And the next check, "Did you include that amount in the sum which you say is unreported income?" He said, "No, sir."

And we went down the line, and my recollection is that there wasn't a single check upon which

he had been cross examined or questioned, not a single check, that he included as part of the unreported income.

Well, if those checks aren't included as part of the unreported income, what have they to do with this case? You might just as well bring in my checks too and ask him if he deducted those sums what would he have. It has nothing to do with this case, absolutely nothing.

Every single check—and you can examine these checks—some \$6000 in this sum, piles of them, all marked by the defendant and all put before Mr. Eustice and cross examined, if and maybe and assume, but not a single one of those checks was taken as part of the unreported income. And if that is true then there is nothing to worry about those checks, no reason to deduct those checks from the unreported income. He didn't take them in. They had nothing to do with his calculations and nothing to do with the figure which he says is shown to have been the additional sum of money which was furnished by Mr. Ormont and which was not reported. [1439]

And then we had this business of cross-examination of applications for war savings bonds. Any connection between the applications that were put up by defense counsel concerning which he questioned Mr. Eustice and any of the particular bonds that Mr. Eustice took in as income bought with unreported income? No connection shown, just an application. And every one of those bonds, by the way, must have been bought with an application.

Checks, figures, \$1322.27. "Add up these figures," I asked Mr. Eustice. "Were any of those sums taken in by you as unreported income?" He said, "No, sir." It has nothing to do with this case at all. More checks—more checks.

I ask you if those aren't some of the extra pieces in the box. We are dealing with a jigsaw juzzle, with certain evidence. I ask you to consider whether those aren't the extra pieces that have nothing to do with this case. Very confusing, no doubt about it, and if you don't separate them you will never get to building the jigsaw puzzle as it should be built. You will never get to the final picture. You will have so many pieces that have nothing to do with it that you may give up. But I say to you, ladies and gentlemen, that the evidence which shows what was the unreported income is so clear and convincing and completely undisputed, completely undisputed, that there isn't any doubt as to the unreported income and there isn't even any substantial doubt as to what [1440] the sum is.

Now what did Mr. Eustice tell you specifically? The year 1944—I am only going to deal with 1944—he told you how much the original return reported, a sum which was shown as salary, some \$4500. Mr. Eustice said that he found about \$27,000 more than Mr. Ormont had earned and hadn't reported. Rents shown, various other deductions and items shown, unreported. What was the difference? The difference was between the amount reported, some \$9000, and the correct amount, some \$36,000.

I ask you, is that difference substantial? Is that a sum that one overlooks in his computations as you might small expenditures for hairpins or something? Is that something that one doesn't take into account or is that something that someone wilfully and deliberately conceals for the purpose of defeating and evading the payment of a substantial part of his tax?

And as to these figures which are in the record—they might not be precise but your memory is much better than mine, I am sure—Mr. Eustice told you where he got those figures. He told you how he got them. He told you what he based them on. And there isn't any contradiction as to the figures.

Yes, there is an attempt to confuse, there is an attempt to drag something else in, but as to the figures as to which he testified, they are all in there. There were one or two [1441] items which Mr. Eustice took in as income which might or might not be income, which might be repayment of a loan or something. I don't remember what the items were, but I don't think that they exceeded \$2000. I don't think they even reached \$1000. But the difference between \$1000 which he may have taken in which he shouldn't have—I don't say he did, but if he did—the *difference that* and the \$26,000 or \$27,000 additional, that is immaterial. That is just a drop in the bucket. That is another extra piece to take your attention off the main figure.

I submit to you, ladies and gentlemen, that in Mr. Eustice's testimony with reference to the computations of the amounts shown on the books and records of the Acme Meat Company and the amounts shown upon the bank records that are undenied and undisputed as of this amount, and that every single one of those other items dragged in have absolutely nothing to do with this because Mr. Eustice did not take them in as part of the unreported income.

Now I am not going to take your time to point out and show you all these if questions and assuming questions—you remember them—this thing went on for so long that after a while it was perfectly clear as to what was going on and I think it is perfectly clear as to why it was going on. And that is another thing to consider, as I told you, because this case deals with concealment of money, failure to report money [1442] and an attempt to defeat and evade a tax. You take into account what goes on with reference to all disclosures and everything. Are you getting complete information, or have you got just the information that Mr. Eustice put in, undenied, undisputed and corroborated? I will show you how.

Mr. Link testified. Mr. Link, as you noticed, spoke with an accent. I think he said he was German. He said he had been a bookkeeper for Mr. Ormont for a large number of years. I don't remember why he said he left, but my recollection is that it was something not very pleasant, some reason he had that was not a very good reason. But

the important thing is that he testified to, and the important thing that counts in this case because it deals with this attempt to defeat and evade, it deals with the state of mind of the defendant, it shows you his wilfulness, his deliberateness, his intent and his purpose, is the fact that Mr. Ormont told Mr. Link to change certain figures on those books, raise the figures. That is falsifying his records.

Mr. Ormont told you that he prepared income tax returns for certain years and he prepared those returns from the figures shown on the books and he was supposed to get all the invoices and he was going to enter all the income on the books so that he could prepare these things later on. And he spoke to Mr. Ormont and he asked him, "Have you got any more income?" [1443]

"No."

And then Mr. Link also told you that he subsequently obtained possession of some invoices, invoices which he never recorded on the books because, as he told you, he had never been given those invoices. And what did those invoices show, ladies and gentlemen? Those invoices showed on their face—and they are part of the exhibits; you can examine them—but they showed on their face that the money shown on them was paid, the date it was paid, and it had Mr. Ormont's signature. That is some more money that isn't on the books, some more money unreported, some more evidence pointing to the deliberateness and willfulness of the activities of Mr. Ormont. [1444]

Then you remember Mr. Link told you about the relationship between Mr. Ormont and Mr. Himmelfarb. You will remember he told you why Mr. Ormont said they were putting Mr. Himmelfarb down as an employee. He had reasons. Whatever the reasons are doesn't make any difference; the important thing is that an important fact like that he was concealing, and he was putting something on his books not to show the true facts but to show a fact that wasn't true for purposes of his own, whatever they may be. What is the difference? Doesn't that show you what sort of intellect you are dealing with, what sort of purpose and intent he has in mind? Doesn't it show you what sort of willfulness he had in accounting for his return? Then in 1944 he begins to do other things which we will go into more in detail in a moment.

And was Mr. Link's testimony shaken? On cross examination the questions sounded to me as though they were trying Mr. Link. Can't a witness come in here to this court or any other court and testify without a searching, thorough probing into his motives? Can't an honest man like Mr. Link, Mr. Gorgerty, or any other man take the stand and tell what he knows without an attempt to show that he has some evil motive, something behind it? An informer. Suppose he is an informer? I tell you, ladies and gentlemen, that a lot of laws are enforced because people come in and tell the prosecuting officials of what happened, and if the public of this [1445] country is not interested in telling what happened when they know the events, there will be a

lot less enforcement. There is nothing wrong with telling the authorities, who represent you, your officials, your government, coming in and telling them what you as the people of the United States know about certain facts. There is nothing wrong with that. And no inflection of the voice in the question, no accusing look or anything else will change that salient fact, that in this country when a person who is a citizen, who is a resident of this country, has a knowledge of certain facts which may be a violation of the law, it is not only his privilege but I submit to you that it is his duty to come in and tell the proper officials so that proper action can be taken by his representatives, by his government, by his enforcing officials. There is nothing wrong with Mr. Link coming in, informer or in any other way; if he has information which he thinks shows that something is being done in violation of the law it was his duty to come in and tell, and he did tell. What is wrong with that? What difference does it make? The question is, was there anything to shake his testimony as to what Mr. Ormont told him to put on the books and records as to the changes in the figures that he told him about? As to these changes, is there anything to contradict that? Search your minds and see if you can find any contradictions. I couldn't. I still can't. I don't think there are any. [1446]

Then we had Mr. Gorgerty. He had nothing to do with this case. He is not one of the parties. He doesn't work for any of the parties. He sells insurance. He is in business. He has a lot of clients.

One of his clients was Phillip Himmelfarb. He comes in and testifies as to the conversation he had. Mr. Ormont was present, Mr. Phillip Himmelfarb was present, and Mr. Himmelfarb or Mr. Ormont—I don't remember which; I think it was Mr. Himmelfarb—told him that they were partners and he wanted to change certain insurance policy to provide for coverage for the partnership.

Ormont and Himmelfarb partners. Anything wrong with Mr. Gorgerty coming in here and telling the truth? Must we also probe behind Mr. Gorgerty? But I won't go into Mr. Gorgerty, I think Mr. Gorgerty took care of himself. You heard him. You saw him.

But again that is another fact. If everything is open and aboveboard, why are they concealing the fact that they are partners? Why all this to-do over whether they are partners or not? I can't figure out whether it makes any difference or not, whether they are or aren't, but I know it makes this difference, that everything that is concealed tends to show that the person who you charge as having violated the law, it tends to show whether he violated it or not, it tends to show how he operates, and it is one of the facts that you should take into consideration as to the element of willfulness.

And keep this in mind, because we are going to get to a very important instrument, the fiscal year return—so bear in mind that the policy on its face, and it is in evidence, you can examine it, is a policy covering Sam Ormont and Phillip Himmelfarb and it says “Co-partners dong business as Acme Meat

Company." And then remember also that that policy shows that it covers meat. That is very important, meat. That is what they are selling in this case, and I will tell you about it more when we get to the fiscal year return.

Then you remember Mr. Smith came down here. Mr. Smith had borrowed some money from Mr. Ormont and Mr. Smith had paid \$63 interest on the money. He told you when he paid it and I think that counsel for the defendant conceded, he stipulated, and his Honor will tell you that once a fact is stipulated to you have to consider it as the fact, you don't have to decide whether a witness is credible or isn't, it is a fact; he said he paid \$63 interest. Was that \$63 interest reported on the return where it calls for the reporting of interest in the year 1943? No.

Just remember now, you are not trying it for 1943, only with reference to 1944. But on the element of willfulness, whether he willfully and deliberately, as charged in the indictment, in 1944 attempted to defeat and evade a large part of his tax, you can take that into account too. It is another incident of concealment of something or other. It doesn't [1448] make any difference what, it just shows you what you are dealing with. It just shows you whether a person acted willfully or whether later on in 1944 it was all a big mistake.

Then we had Mr. Malin. Mr. Malin was the accountant. And without going into what Mr. Malin said, I would just like to call your attention to the circumstances surrounding him. Now the defendants asserted that they thought they were on a

fiscal year basis, so they prepared a fiscal year return. But ask yourself this question: [1449]

A person who has not anything to conceal, and is going about to prepare his income tax return, which he is supposed to file, does he need the help of an accountant? He goes to an accountant. Why does he first go to an attorney? Why does he first go to an attorney to get help in connection with that, and three or four days after the income tax investigators come down to talk to him?

Just consider now the circumstance of the defendants going to an attorney just as soon as the Internal Revenue investigation starts; they go to an attorney, and the attorney takes them to an accountant, and they prepare some documents, which you see filed here. Just consider whether those people, who go to an attorney for that purpose, if they go to an attorney? Ask yourself that question, and ask yourself whether or not it has some bearing upon the question of wilfulness, of good faith, of clean purpose?

And Mr. Malin then prepared some documents. Those documents are in evidence. Mr. Malin prepared the fiscal year return, and he prepared different exhibits, so far as Mr. Ormont is concerned, —51 A, B, C and D. Those exhibits, if you examine them, you will find tend to corroborate Mr. Eustice's testimony to within a few hundred dollars. When you consider that they deal with thousands and thousands of dollars, that is a complete and absolute corroboration.

The exhibits prepared and signed by the defendant himself, [1450] the defendant Ormont, if you will examine them will, on their face, tell you the whole picture, even if Mr. Eustice were not giving testimony about them; if all you had were the exhibits 51 A, B, C and D; if all you had were the income tax return for 1944; if all you had was the income tax return which shows how much money was earned in that period; those documents alone tell you what the additional income was.

I will go into that in a few minutes, but first I want to take up the testimony of Mr. Bircher, and Mr. Phoebus. You remember they began their investigations, or at least the first time the defendant Ormont was contacted was around May 18th. The testimony of Mr. Bircher and Mr. Phoebus is completely and wholly undenied, uncontradicted. There isn't a single iota of evidence to offset anything they said as to what Mr. Ormont said to him, or as to what happened.. Not a word.

All Mr. Ormont testified to were those checks, and those transactions. You will remember that. So that that testimony is completely uncontradicted, undenied and undisputed, and is testimony which you can readily accept at its face value as being true. And there is no reason why you should not.

What is that testimony? That testimony shows that on the 24th day of May, after the investigation had been in progress for about five or six days, Mr. Ormont came to the Internal Revenue Office, here in this building, saying, in effect, that he wanted to look people in the face; he wanted [1451] to get

this thing over; that he wanted to clean things up. A very nice attitude; very complimentary and commendable, especially commendable when it is given effect six or seven days after the investigation takes place.

I say to you, there is nothing so salutary as a defendant or a person being investigated to rush in and pay his taxes after they have caught up with him. If that could be done, there would never be any problem; there would never be any investigation. You might have an investigation, to get them started; but you never would have a prosecution involving the non-payment of tax, non-reported tax, because all a person would have to do, as soon as he finds he is caught, is to surrender, and once they get the handcuffs, he comes in and wants to pay. That isn't the question. The question is not whether on the 24th day of May, 1945, the taxpayer was willing to come clean, and pay up the money. The question is, what date did he file his income tax return? The date alleged in the indictment? Did he at that time report any income at that time; report the facts due at that time? That is the date alleged in the indictment, the 15th day of March, 1945; not the 24th day of May, 1945, five or six days after the investigation, and after finding he is caught.

That is not the date. It is too late. He came up that day, and had a discussion with Mr. Bircher, and Mr. Phoebus. I am not going to go into that discussion. You will remember [1452] the discussion; what went on. But the sum and substance of it was that Mr. Ormont was operating the Acme

Meat Company. He was selling meat. He marked on the invoices the price for the meat. In addition to that he gets side money, extra payments, additional moneys. He would like to call them gifts. He would like to call them anything else.

But I ask you, what are those payments? Do you think they were payments in the business, which Mr. Ormont earned, as he reported, some \$12,000, in the year 1944; he had such a fine clientele that they gave him gifts, approximately eight-twelfths of the sum he reported in 1945; about \$220,000.00. Do you believe he got \$220,000.00 in free and voluntary gifts? . You know what was going on with the sale of meat. You know what those payments are. I am not even going to mention them by name. It would be insulting your intelligence to mention them,—these extra, unreported side payments, that he took with the left hand, the amount of money, and put it in the left pocket, and then he puts in the Acme books, and takes the extra money with the right hand, and puts it in the right-hand pocket. Oh, that was a joint venture. That was separate and apart. Simultaneously, on the same sale of meats, he has engaged in two separate enterprises, one selling at the price shown on the invoices, and the other getting this unreported additional amount, this extra money, this side money, which was split fifty-fifty, and the legitimate part being [1453] split on the basis Mr. Bircher and Mr. Phoebus told you.

And they take this money, and they put it away, Mr. Ormont particularly, and on the 24th day of May, 1945, when he is caught, he rushes in and files

a return. But even in the return which he filed on that day it fails to disclose exactly what happened, because the return, if you will examine it, even there conceals the source of the money. It says, Business or Profession: Miscellaneous enterprises. What miscellaneous enterprises? What enterprises separate and apart from the sale of meat by the Acme Meat Company?

Mr. Link was asked, and he testified, so far as I know, Mr. Ormont did not have any other business, than the Acme Meat Company. What miscellaneous business enterprises, from which is earned \$71,000, without telling the nature of the enterprise, or anything? What is this income? It says: Miscellaneous income.

Any deductions? You know, you have deductions when you earn money; you have to return the gross income, and you are given deductions, and then you have your net income—miscellaneous enterprises; joint ventures of some sort.

I ask you, ladies and gentlemen, if that kind of testimony will tell, whether that kind of evidence will convince you that their income tax was reported properly, or if it was on a fiscal year basis? Money that comes in as extra payment, money collected, which the right hand keeps from the left [1454] hand, money, after the investigation starts in, reported as miscellaneous enterprises, miscellaneous income; no expense, \$70,000, split, in two years—do you think that is a bona fide business venture, on a fiscal year basis, when he rushed in, on May 24th? I won't go into that. You know

what transpired on that date, and his Honor will instruct you as to what you should consider in that connection, and you will decide for yourself if it is a bona fide joint venture, bona fide business enterprise on a fiscal year basis, or is this just a method concocted up in a hurry, after the investigation has started, to account for money, to excuse it, to report it, to get out of any possible charges of violation.

The investigation starts on the 18th. He rushes to an attorney; gets an accountant on the 21st, and quickly, as fast as he can write, to get up a document which is filed on the 24th, and it was on a fiscal year basis. The right hand, a fiscal year basis, and the left hand is on a calendar basis.

This fiscal year business is really very simple in this case. If it were true that they had a separate business enterprise, and it was run on a fiscal year basis; if it was apart from the Acme Meat Company's operation; if it were true they had some other basis of earning money, whether a joint venture, or a partnership; if it were true they were on a fiscal year basis, and the fiscal year started May 1, 1944, and ran to April 30, 1945, this would be a return properly filed, and [1455] the income would be properly reported.

Do you think they had a separate joint venture, apart from the Acme Meat Company? Even in this return it does not say anything about a partnership. You will remember Mr. Gorgerty testified they said they were partners, and they had an insurance policy, during the same period, and Mr. Gorgerty said that they are partners. They gave the

insurance policy as partners. What does this joint venture say? It does not say from what; it does not say anything. 50 per cent of the money to Mr. Ormont, and 50 per cent to Mr. Himmelfarb. Just take the first eight months of that, which was 1944; take 8/12ths of \$70,000, allocate it to each defendant, and then you will know exactly about the income, because there are no books or records. You will know about how much money they earned in 1944. That money they did not report, although they knew they earned it in 1944; knew it was part of the operation of the Acme Meat Company; and knew it was side money, in connection with the sale of meat. They did not report it.

Ask yourself this: Do you think they would have reported it at any time, if they had not been investigated? Ask yourself. If you find this return is phony, just a means of getting out of a trap, after they find themselves being investigated, after they found that they were caught, disregard this return for whatever it is worth.

They don't report on how or where the money came from, but [1456] that same day, after it was filed—they filed it in the morning; Mr. Ormont went up to see Mr. Bircher and Mr. Phoebus, and had a long discussion. You remember the record. He told them where the money was from. You remember he tried to get out of saying it was extra payments; side money. He made it sound like gifts. They disclosed at that time what that money was, and, if everything was above board, clean, honest, and not a violation of law, why didn't they put it

on the return? Why did they have these hieroglyphics. Miscellaneous income, \$71,000.00. No explanation; nothing. And there was some testimony that they told Mr. Bircher and Mr. Phoebus they were afraid of some other agency finding it out. You remember they stated that, and that's why they concealed it. That is why they did not report it.

But it does not make any difference why they did not, so long as it was wilfully and deliberately not reported, and it should have been reported then, so far as I am concerned. It is up to you to decide finally, in Count 1, whether there was a wilful attempt to evade and defeat the tax which was due.

Mr. Ormont's testimony, so far as I can see, did not in any way tend to establish any innocence on his part. Mr. Eustice disclosed they had accounted with some checks. Those checks were taken in as unreported income by Mr. Eustice. They were not afraid of those checks, and they were shown to Mr. Eustice. Mr. Eustice specifically testified he did not [1457] take those sums of money in as part of the unreported income; that he did not know whether they were used to buy bonds, or not to buy bonds, or were used for living expenses or not. We don't care. The only thing we are interested in here, is the thing charged in the indictment, was it a wilful and deliberate attempt to defeat and evade the tax by failing to report the true amount. [1458]

Now I don't really see, as I say, why he shouldn't deal only with those things. We might as well bring in a lot of other checks that have nothing to do with this at all. Those checks, as a matter of

fact, show nothing. As a matter of fact, by discussing only a few checks I think that that also bears upon willfulness. If you have nothing to hide why discuss only a few checks, especially checks that are shown, at least as to part of them, not to have been taken in as part of the unreported income by the agent.

Now some questions as to whether these things were gifts, this money he received on the side was gifts. I will leave that to you. You have had experience and you have been in the world long enough. Do you think that in a business which produced an income that was reported of \$12,000 for the year 1944, do you think that the customers of that business brought in \$70,000 in gifts? That is a new term for those side payments, gifts, voluntary gifts. You don't have to pay it, but what do you get if you don't? You know what those payments were.

Then Mr. Ormont told you about cash he had, large amounts of cash. How much cash? \$11,000, \$12,000. How much did you accumulate in the preceding year 1941? Don't know. About how much? Oh, between \$700 and \$1000. Every year between \$700 and \$1000. Why didn't you put it in the bank? His mother said not to keep all his eggs in one basket. [1459]

I wish if you had the time that you would look at the bank deposits of Mr. Ormont. They are in evidence. The accounts are in evidence. Just see how much money Mr. Ormont did put in the banks during that period. See the staggering sums of

money going into those accounts as compared to the amount of money which he testified was his income for the year 1941 and the preceding years, the years in which he said he didn't want to put his eggs in one basket. A couple of Japanese banks failed and he was concerned about banks. Why this \$12,000 that he held out and didn't put in the bank was a drop in the bucket compared to the sums that you will find on those slips. And I am not going to go into it because you can just scan them and see the size of the deposits going in, and then decide for yourselves whether what he told you is true, whether the reason for having cash on hand and not putting it in the bank had something to do with banks or something else, and then from that decide the more important question, did he actually have cash on hand, do you think he had that cash, or do you think that that is something else to becloud the issues in this case?

And supposing he had the cash? Let's assume he had the cash. What did he do with it? Well, in 1943 out of the \$12,000 he bought about \$8000 worth of bonds. You remember that testimony, \$8000 worth of bonds. That I assume is intended to show, or at least you are supposed to draw the inference [1460] from that, that the unreported income which Mr. Eustice claims this man accumulated during that year wasn't really accumulated during that year because he bought \$8000 worth of bonds.

Take the \$8000 and then look at this Schedule No. 42 which shows how many bonds were actually bought during that year and see if you don't find

over \$50,000 worth of bonds bought that year—\$50,000 worth of bonds—some such sum. Just look at them. They are enumerated on the schedule and it is in evidence.

What is \$8000 off of that? It is \$42,000. Well, let's assume he had \$8000 in cash. Does that change the story or the picture that was presented here by Mr. Eustice from these records? I submit to you that it doesn't change it a single iota, not a single iota. Any explanation as to the other money that was used to buy the bonds? No, except some checks were shown here. Which of the bonds were bought with those checks? I can't say. I don't know.

And notice another thing on these checks which I think is very important. Acme Meat Company checks payable to Sam Ormont, signed by Sam Ormont. Again from the right pocket to the left pocket. Where did that money come to originally to the Acme Meat Company? Don't know. Have no way of telling.

If it is income, ladies and gentlemen, as I submit it is, I think as the evidence shows that is it, that doesn't make [1461] any difference who paid it. The important thing is that it is income.

Then you will remember the testimony here dealing with the net worth of the defendant. What is net worth? I don't know if some of you know. Net worth is what you are worth today, what you are worth on a certain date. It is as simple as all that. If you have \$10,000 in the bank and you have a car worth \$2000 and a house worth \$18,000, and let's say you don't owe any money to anybody, you are

worth \$30,000. All you have to do is add the \$10,000, \$2000 and \$18,000 and that is your net worth.

What has he got to show for it, in other words? Most people can take this money and spend it but lots of times they save it or they buy something with it which is around and you can balance it, and Mr. Eustice, as you remember, also testified with reference to net worth.

In other words, his testimony as to the income didn't only come from a showing of how many deposits were made, how much money was deposited, how much money was taken in, but he even checked it back and showed you how much the man was worth in physical worldly goods to show whether he actually had that money. And besides that Mr. Malin himself, with information which he told you he got from the defendant Ormont, prepared net worth statements too. They also show how much worldly wealth the defendant Ormont had as of the period [1462] shown on these documents. And if you compare them with the amount that Mr. Eustice testified to, as I told you before, compare the amount that Mr. Ormont through his accountant shows as his net worth, compare that with what Mr. Eustice told you, you will find very little discrepancy. That I think you can take into account as attesting to the completeness and competency of the accounting work that was performed by Mr. Eustice in this connection. [1463]

But if you don't take that into account, you don't have to because most of the books and records are here, and you can examine them and you can add these things up yourself.

Now again with reference to the testimony of Mr. Ormont here, and how much cash he had on hand, where he got that cash and everything else, it is part of your function to consider if he is telling the truth and how much of the truth. All the truth? Part of the truth? And also in that connection just ask yourself, what about that affidavit that he gave Mr. Bircher? You remember that affidavit that he gave Mr. Bircher.

I submit to you, ladies and gentlemen, that the testimony of the defendant Ormont, if you analyze it coldly, tends to prove rather than disprove the government's case. Not only does it tend to prove it by what he affirmatively said but by what was not known by him, as he testified. That testimony in and of itself tends to establish the truth of the charges that the government has in count 1 of the indictment.

With reference again to the fiscal year return, his Honor will tell you that if you are operating on a fiscal year basis you can file a fiscal year return, provided you keep books and records, but that if you don't keep books and records of the type that is required by law you cannot file a fiscal year return.

What books and records are there as to the \$71,000, [1464] ladies and gentlemen? You remember the books and records. There was a little slip of paper out of a gold-edged book and a little slip of paper that is in evidence. That little slip of paper contained a cumulative sum. It doesn't show where it came from, when it was earned, nothing upon it whereby you could base an examination or

from which you could check and determine if that is the correct amount, just a little piece of paper.

Mr. Ormont had that paper. And you will remember Mr. Bircher asked for a leaf from the book, and Mr. Ormont gave him a leaf from the book. Here it is. It is Government's Exhibit 53. There is the leaf, the little piece of paper. And he has a cumulative running figure showing how much he earned, and he splits it up to show how much he earned in 1944. That is all the proof you need as to the extra income in 1944, right in his own book.

His Honor will tell you what the requirements are as to keeping books, and when you hear that instruction just remember to take into account what this thing looks like and what it shows as compared with what his Honor tells you the books have to show, how they should be kept. Just bear that in mind, ladies and gentlemen.

Now there is a sum stated in the indictment in count 1 as to how much we claim as the correct income. Of course the amount that we say was reported on the 1944 return, you [1465] can compare it, you have it, but the amount which we claim should have been the amount reported and the amount of tax reported as to that figure, I just want to leave you this one word: His Honor will tell you that if we do not prove the whole figure, if we prove substantially the figure, if we prove a substantial amount of money, it is just as good as proving the whole figure. In other words, you don't have to hold the government to proving precisely that sum of money which is stated in the indictment. Substantially that is enough. And the

amount of money shown on that little slip of paper which I have shown you, which is Government's Exhibit 53, as well as the amount of money which is shown upon these documents which were filed by Mr. Ormont and the accountant, that is practically the same as the amount shown in the indictment under count 1. So there isn't any problem as to any variance between the amount shown and the amount that we have established.

Now I am not going to take much more of your time. As a matter of fact, I don't have much more time. But I will say this to you in closing, I said to you at the outset that this is really a simple case. This is really a simple case. And if you just disregard all the irrelevancies, all of these red herrings—you know what a red herring is, it is something you draw in here to distract attention—just forget all about these things that were dragged in and that have nothing [1466] to do with this case, and what does this case consist of? Just two simple items: How much money did he report in 1944 and how much tax did he pay. That is shown by the return. Did he have any more money that he didn't report, and how much was that, and how much was the tax on that? That I think we have proved beyond any doubt whatsoever, I submit to you ladies and gentlemen, and that the additional sum of money was so substantial as to be almost ludicrous, if it is said to be something on the side or something additional that shouldn't have been reported in that year.

Then there is only the other item, did he do it willfully or was it an honest mistake. We are not here asking you to find anything on the basis of honest mistakes. This case doesn't involve an honest mistake. If it did we wouldn't be here, and I don't think you will conclude that it was an honest mistake. An honest mistake is one thing. Nobody is prosecuted for an honest mistake. Nobody is prosecuted for a belief that facts are so and when others aren't so. As a matter of fact, honest mistakes are not in this picture. We charge that this was done willfully and deliberately and with purposes, the very purpose that we charge in this indictment, that this was done willfully and that it was an attempt to defeat and evade the tax. That is exactly what it was, ladies and gentlemen. That is precisely what I submit to you the government's proof has shown. [1467]

Now that is as to Mr. Ormont. Now I think I have about 25 or 30 minutes for Mr. Himmelfarb.

The Court: Maybe it would be convenient to take a short recess and then you can dispose of your argument and we will hear from Mr. Katz.

We will have a short recess. Remember the admonition.

(Short recess.)

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: So stipulated.

Mr. Robnett: So stipulated.

Mr. Strong: Now that's for Mr Ormont. Now Mr. Himmelfarb.

Mr. Himmelfarb, as I said, is charged in count 2. Count 2 charges that on or about the 14th day of March 1945 Mr. Himmelfarb did willfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax which is due and owing by him for the year 1944, by preparing and causing to be prepared and filing and causing to be filed, a false and fraudulent return wherein he stated that his net income for the year 1944, computed on a community property basis, was in the sum of \$4,111.74, for which the income tax was \$656, and the government charges that the correct amount of his net income for that year, also computed on the same community property basis, was closer to \$17,700, [1468] which is a difference of some \$12,000, and that the tax on that should have been around \$5,800, rather than the sum which he reported of \$656.

Again in substance the same contention of the government is supported by the evidence of the same type as that which I mentioned as to Mr. Ormont. Mr. Himmelfarb for the year reports so much money as his income, paid so much tax, and we say that that isn't enough, that he willfully and deliberately didn't report some more money, as I said, around \$12,000.

What is the evidence as to Mr. Himmelfarb? You will remember a slightly different picture here as to Mr. Himmelfarb. First we have an income tax return, which Mr. Himmelfarb filed, and which is Government's Exhibit 4, and that is in evidence and you can examine it. Mr. Himmelfarb filed it

on March 14, 1946, and he tells you where he got the money. According to this his employer's name is Sam Ormont, doing business as Acme Meat Company—Sam Ormont, doing business as Acme Meat Company. Mr. Gorgerty, you will remember, testified that they were a partnership, that Mr. Himmelfarb had that policy changed. There is the policy, by the way. It is also in evidence. That is Government's Exhibit 44. You can look at that. That says right on its face, and the date of the endorsement is May 20, 1944. That is when it was changed. And the name of the assured is hereby changed to [1469] read Phillip Himmelfarb and Sam Ormont, co-partners, doing business as Acme Meat Company. And there is the form itself which shows what it covers, and again it shows here on a standard form that is attached—I won't describe it; it is the first sheet here and you can look at it—but this policy assures Phillip Himmelfarb and Sam Ormont, co-partners, doing business as Acme Meat Company, on merchandise of every description consisting principally of meats, including livestock on the premises, and then it goes into all that other business, it gives the address and everything else.

So there is evidence in this case right at the outset that Mr. Himmelfarb is also not telling everything. That you can take into account in determining not only what his relationship was to Mr. Ormont and what part of that money was his and what he got, but you also can take that into account in determining willfulness. Willfulness is a very important term here, as his Honor will tell you

more about later. But bear in mind these little indications of willfulness. It doesn't say on his return that he is a co-partner, it says here that his employer is Sam Ormont, doing business as Acme Meat Company.

And it also reports in that return that his income is in a certain amount, the amount that I read to you, and shows that the tax is \$656, which is made up apparently part in cash payments on estimated tax and part by being withheld. [1470]

Then there is also the return of Mrs. Himmelfarb, who of course is not involved in this case, she is not a defendant, she is his wife, and as you know she gets half of his income, as you ladies probably know very well, that you are entitled to half of the income of your husband. And she reports a certain amount of money as one-half of the community property of her husband. So that her return is predicated on what Mr. Himmelfarb—and if I say Ormont in this connection I always mean Himmelfarb because I am talking about Himmelfarb; this only deals with Himmelfarb—that shows the amount he paid, as we charge, the amount that he reported as we charge.

Now the only problem that exists is, did he have any more income? Did he have this extra income which we say he did have and which he should have reported?

Well, as to that the evidence is simply this: First they are co-partners, but he didn't say so on his return. We have to get Mr. Gorgerty. He tells you what happened. You remember Mr. Gorgerty, and the policy itself. That you can examine.

Then we have this revealing document known as the fiscal year return. That is Government's Exhibit No. 6. That says right on its face that it covers the calendar year 1944, or fiscal year, and then it shows that it covers the year beginning May 1, 1944, and it runs right through to April 30, 1945. Now that May 1st is just about the same time as this [1471] policy was issued. You will remember this endorsement bears the date of May 20, 1944, so that at that time they are co-partners, doing business as Acme Meat Company.

And you have this return again, the return on its face purports to be a return for Sam Ormont and Phillip Himmelfarb. It shows miscellaneous enterprises, and they give the address, Imperial Highway and Garfield Avenue, South Gate, California, and there again—and this I am offering against Mr. Himmelfarb, the same return—miscellaneous return, doesn't say what, doesn't say where, doesn't say a thing about it, \$71,383.

Any deductions? No deductions. All nice clean neat profit.

And if you turn a few pages you will find where it shows you how it is split up, 50 per cent to Sam Ormont, \$35,694 and some cents, and 50 per cent to Phillip Himmelfarb, \$35,694 and some cents, prepared by Mr. Malin, filed as I said before on May 24th. [1472]

In connection with this return you remember that an accountant was put on the stand by Mr. Katz, and he had some figures and he was using some schedules, and you will remember he was hired just

the day before, and you remember he testified—I think when I asked him—whether he got any information from the defendant Himmelfarb, and he said no, the only information he had was what is shown on the face of these documents, this income tax return which is the fiscal year return, the so-called fiscal year return, plus the income tax return of the defendant himself. And you remember that that accountant—I think his name was Kibbee—Mr. Kibbee was a very nice gentleman. He also has nothing to do with this case. I submit to you that his testimony has less to do with the case than he has, because his testimony is simply a computation of which is shown on the face of these things, but in one respect it is very important, because Mr. Kibbee allocated, their own accountant, their own case, allocated this money to show what part of it was earned in 1944 by Mr. Himmelfarb, and that was somewhere around \$11,000 or \$12,000 in addition to the amount reported.

Now what further proof do you need as to how much money was earned in 1944? Their own accountant comes in and tells you. He can figure *the out* from these documents himself. We don't have to do any figuring at all. We don't have to put on anything. You don't have to figure it either. If it [1473] hadn't been for the accountant here you would have had to do that, you would have had to taken 8/12 of that fiscal year and the reason it is 8/12 is because it starts on May 1st, so that makes it from May 1st until December 31st a period of eight months in 1944, and then there are the four

months in 1945. So to determine how much it will be in 1944 you should take 8/12 of the amount reported since that is the period it covers. But you don't have to do that, and I won't ask you to go through that, as I have suggested you might go through these others, you don't have to go through these reports at all because Mr. Kibbee told you what that sum was, and that sum is almost the same as that which we claim in our indictment was the additional income for that year. All Mr. Kibbee can do is just allocate and compute.

In addition to that, which on its face, as I said, and through Mr. Kibbee's testimony showed, how much money they had there is the fact that they are partners and the fact that his return, Himmelfarb's return, doesn't show that they are partners, again concealing a fact of that type, if you find that it is concealing a fact, if you find that they were partners from Mr. Gorgerty's testimony and the policy itself, you can take the fact that that was concealed from his return to account, you can take that into account in determining whether or not Mr. Himmelfarb in failing to report that money did so willfully, as we charge. You can take that into [1474] account in determining his intent.

Of course Mr. Himmelfarb, just as well as Mr. Ormont, filed a fiscal year return six days after the investigation started. They both filed them together. It is the one document. They both went to an attorney and then the attorney took them to Mr. Malin, the accountant, and then Mr. Malin prepared all these things and got together these sched-

ules which are Government's Exhibits 50-A through D, which you can examine, and he rushed that thing in.

I ask you again to take into account, when you are considering the question of willfulness, the question of whether there is any attempt to evade and defeat, the question of whether there is any concealment, take into account this strange fact that just as soon as an investigation starts they rush to a lawyer, they hire and get an attorney, as he testified here, and that attorney was retained for both Mr. Himmelfarb and Mr. Ormont, and the attorney gets an accountant, and then the accountant does the computing and in they come, six days after the investigation started. Doesn't that show anything as to what they were doing before the investigation started? And doesn't that tend to show to you as reasonable men and women what they would have done if the investigation hadn't started on that date?

If there was nothing to hide, if there was no problem, why didn't they go to an accountant and state, if they wanted [1475] to add on, and why do they need an accountant to put down on a form miscellaneous income \$71,000? If you had a lot of deductions and subtractions and things like that I probably would get an expert, but when you haven't got anything to deduct, all you have to put down is how much income you got, and all the accountant knows is what you tell him, why do you need an accountant? [1476]

Why do you need an attorney? Why do you need anybody to tell you anything that is open and aboveboard? Why not just do it yourself? No, they went to an attorney; they went to an accountant, and Mr. Kibbee himself—this was rather amusing, because he was supposed to be an expert—he couldn't find some of the money unaccounted for, with his own computation. He couldn't figure it out, when he knew all the facts from the basis of the documents himself. Were there some more facts? Mr. Kibbee could not tell you about some small sums.

. Now, besides what Mr. Kibbee told you, as to how much money got on the 1944 income, you have those documents which Mr. Malin filed. Let me read you this letter, which was filed, and which was signed by Phillip Himmelfarb, and listen, not only to what I say, but try to keep in mind what is being stated here, and how it is being stated. Here is a letter he sent in addressed to Mr. Donald Bircher, Special Agent, Federal Building, Los Angeles, California.

“Dear Mr. Bircher:

“In answer to your inquiry substantiating the amount of \$35,694.42 as my share of the profits from the joint venture, we kept a cumulative record. Each time additional amounts were received, these were added to the previous accumulated total.

“This record is accurate to the best of my knowledge and belief. No other records were kept.” [1477]

Bear that in mind, ladies and gentlemen, when you listen to his Honor's instructions, as to what record you have to have to have authority at any time to file a fiscal year return.

"No other records were kept. All of the money received is represented by the total reported.

"Respecting the division of the profits:

"You ask if we divided the profits weekly, monthly or at the end of the fiscal year. In answer to that, there was no set time for distributions. Distributions were made at various intervals.

"The total amount I received" —

This is signed by Phillip Himmelfarb—

"was \$35,694.42. This represented the total amount received by me and there were no expenses.

"Respecting your inquiry whether the total reported was both the gross and the net, the answer is yes. This represented both the gross and the net amount.

"Very truly yours,

/s/ "Phillip Himmelfarb."

Then he files an affidavit under oath, subscribed and sworn to by Phillip Himmelfarb. I will read you this affidavit. When you listen to this, remember the testimony of Mr. Gorgerty. Remember that document; that insurance policy, and whether, in

order to protect themselves, they told Mr. Gorgerty [1478] what relationship they bore, who they were, and how they were operating the business. This is under oath.

“I, Phillip Himmelfarb, being first duly sworn and being of lawful age, depose and state:

“That during the year 1944 I was an employee of the Acme Meat Company;”

I was an employee of the Acme Meat Company. This is being sent to the Bureau of Internal Revenue, when they are inquiring about his income. That's what he tells them; and that's what he testified to, that on the 27th day of July, 1945, he was an employee. He said:

“That during the period commencing with May 1, 1944, and ending on April 30, 1945, I received from the joint venture, which I have engaged in with Samuel Ormont, the sum of \$35,964.42; Samuel Ormont received from this joint venture a similar amount;

“That the total amount of this aforementioned income received by me was not reported by me for the calendar year 1944 but was reported in full in a joint venture return for the period commencing with May 1, 1944, and ending on April 30, 1945.”

And that, in connection with that, and proof of the fact that he got the money—some people might say they got the money; or that they might not have got it—I submit, this document shows what his

assets are, how much he was worth, how [1479] much he got, exactly as the Government says he really got.

There has been filed here 58, Schedule 50 B, which bears the signature of Phillip Himmelfarb, which tells you what he was worth; how much money he got. There is no doubt of the facts; he got none whatsoever. Here is set forth what he is worth, and where the money went, and then he says something, which is somewhat peculiar. If they are operating as a joint venture, and the joint venture is the only joint business, as he says, they are in, let us assume the claim is not that they are partners, he has a statement:

“In addition to this $\frac{1}{2}$ of the profits for the year 1945 accrues. On April 30, 1945, this has been tentatively estimated at \$9,561.06.”

I submit to you, ladies and gentlemen, with reference to Mr. Himmelfarb, there can't be any possible doubt of the fact that he received that money in 1944. He says so himself. His accountant says so. He figured it out for him. There isn't any doubt, so he received just about the same sum we say he received.

Besides that, you have in evidence here the bank records of Mr. Himmelfarb, which show you how much money got into his bank account. In addition, of course, you have all of the circumstances, which I have described to you, with reference to the preparation of the various documents which were marked as part of Government's Exhibit 50. No

books, he says, were kept [1480] of that enterprise. That enterprise consisted of some enterprise Mr. Ormont was engaged in; some joint venture. He says so. He says it under his own signature, his joint venture fiscal year return, and this money came obviously, as this signature to this return shows, from the same source.

I won't go into the source. Ask yourselves what those sources were. I am not going to spend any more time on Phillip Himmelfarb. I think that on the basis of the evidence before you, upon the basis of the fact that he reports additional income for 1945 on a fiscal year return,—all the circumstances concerning the preparation of the fiscal year return, when they do it, how they do it, all those considerations, together with the testimony of their accountant, Mr. Kibbee, together with the testimony of Mr. Malin, together with what was said by Mr. Ormont, by Mr. Himmelfarb in his affidavit, and together with what he says in the letter; and together with the fact that he still claims under oath the fact that he was an employee, when you have seen that he was a partner,—I think that is enough to show that Mr. Himmelfarb too had this unreported income; that that income was earned by him in 1944; earned by him, not as a separate special enterprise, but as a part of their joint venture, and that Mr. Himmelfarb wilfully and deliberately failed to report that income on his tax return.

That he wilfully and deliberately, as charged in Count 2 of the indictment, attempted to defeat and evade a large part of [1481] the income tax due and

owing by him to the United States for the year 1944, by preparing, and causing to be prepared, filing and causing to be filed, with the Collector of Internal Revenue, a false and fraudulent income tax return, wherein he understated his income for that year, which, as I told you, he understated by about \$12,000.00.

That is the Government's case against Mr. Himmelfarb. I submit, upon the evidence, and those pieces of evidence which I have outlined to you, it is clearly indicated that Mr. Himmelfarb was doing precisely what he is charged in the indictment with doing, and that Mr. Himmelfarb is guilty of the offense charged in Count 2, just as Mr. Ormont is guilty of the offense charged in Count 1 of the indictment, as against him.

The Court: Mr. Katz.

Argument in Behalf of Defendant Himmelfarb

Mr. Katz: May it please the Court, counsel, Mr. Strong, and ladies and gentlemen of the jury:

The first jigsaw puzzle that I must unravel, is one created by the condition of the exhibit at this time, and I will try to take up those that I want to refer to in this case.

You ladies and gentlemen of the jury have patiently sat here and attentively listened to much talk, but little evidence, in a little better than three weeks, since his case commenced, and I know that your duty of sitting and serving here as jurors [1482] devolves upon you by reason of the fact that you are citizens of a vital and living Democracy,

and it was lightened to some extent by the fact that the court room was presided over by one possessed of a very cheerful personality and disposition, and particularly a keen sense of humor. At least, I find that to be true of my stay in the court room up to this time.

Even after three long weeks in this court room I believe that I have eventually come to the conclusion that the prosecutor is Strong, but his case is weak, and as against the defendant Himmelfarb it actually is non-existent.

He told you about jigsaw puzzles and the pieces that go to make it up, but insofar as the case against the defendant Phillip Himmelfarb is concerned, he not only did not have the jigsaw puzzle, he not only did not have any pieces; he did not even have a box they should have been in. He came into this court with the statement of what he was going to do, and in the argument that he has made has referred to some exhibits, and it now becomes my duty to review with you the evidence in this case; to go over the testimony and the exhibits that are here before the Court, and when I talk about this case, ladies and gentlemen of the jury, I am talking about the case against the defendant Himmelfarb. That is the only evidence that I am concerned with in this case; the evidence introduced against him.

In the determination of the guilt or innocence, you as [1483] jurors, under your oath, and under the instructions the Court will give you, have the solemn obligation of determining that guilt or innocence upon the evidence that has been introduced

in this case in this court, in this record, against the defendant Himmelfarb, and not upon any statements Mr. Strong makes to you, not upon any statements I make to you, and not upon any evidence that may have come into this case that didn't come in against the defendant Phillip Himmelfarb.

I realize it is a most difficult task to sit in a court room, as you have done, and have heard the evidence come in; very little against one defendant, and the rest against someone else, and you should try in your mind to shut off the other evidence, and determine the case solely upon the evidence that is before you as against the defendant Phillip Himmelfarb, which, under your oaths, and under the instructions you must do. And I believe that a review of the record will help you determine just exactly what that evidence is, and for that reason I have gone over the transcript, and I think you can see from the stack on my desk, which is only a part of them—I have two here—we have written books in this same court room in the three weeks we have been here.

I have gone through these transcripts, so that we may have in mind just exactly what the evidence is, because this case, like any other case, is not to be determined upon conjecture, speculation, surmise, guesswork or suspicion or [1484] innuendos that may be made in argument to you; but must be decided upon the evidence before you. And what is that evidence? It is very interesting really, and I believe you are going to find it so.

The first witness in this case was Mr. Albert D. Allen. He was the man you recall, who was called down from the Collector's office, who found it to be very difficult to get a truck to bring down the voluminous records which he would have to do, and as a result of stipulation between counsel as to what amounts were paid in connection with the taxes, he was excused, and did not testify. So I am going to eliminate him, because he did not actually testify.

Consequently, the first witness then becomes Mr. Baizer, who identified the bank record with respect to Mr. Ormont only, and we must eliminate him. There is no evidence with respect to the defendant Himmelfarb.

The next witness was James E. McClung; the witness in the case, who identified the bank records respecting Sam Ormont only. We eliminate him.

The third witness in the case was Albert H. Jehl. He identified bank records respecting the defendant Ormont only. We must eliminate him.

The next witness in the case was Thomas G. Miller. He identified some stock records of Merrill Lynch, Pierce, Fenner & Beane, respecting the defendant Ormont only. We must [1485] likewise eliminate him.

The next witness was Hugh R. Pingree. He identified records of the Bank of America, 3rd and Chicago Branch, of the defendant Phillip Himmelfarb. Until we get up to the point of Mr. Pingree, we have eliminated four witnesses entirely. There is no evidence from them whatsoever.

We get to Mr. Pingree. What does he do? He comes into court and says these records are records of the bank respecting Mr Himmelfarb's account. He does not testify with respect to any matters contained therein whatsoever. He merely identifies those records.

The sixth witness in the case was Mr. Link, who spent some little time here. The only testimony that Mr. Link gave that is in the record against the defendant Phillip Himmelfarb is to the following effect, and I am giving you in substance the total of that testimony.

He testified that he saw the defendant Himmelfarb performing work on the premises of the Acme Meat Company, during 1944 and 1945; that he saw him make out invoices to customers when they came there; that he would compute the amount due the customer; that he made another computation, and entered the amount on a list, which he kept in the desk drawer; that he saw him sell beef and meat; that he audited payroll checks, and that he checked them against the books, and in the checkbook.

That the payroll checks were issued to Phillip Himmelfarb. [1486] Link never saw Phillip Himmelfarb receive any sum of money in connection with the list which contained the names of customers. Sometimes the handwriting was Himmelfarb, and sometimes the handwriting was Ormont. That he did not record any amount from the list on any books of the Acme Meat Company. That the profits of the Acme Meat Company for the year 1944 were credited to the account of Sam Ormont.

That was the sum total of the evidence that we have in this case from Mr. Link. And let us take that evidence on all of the Pingree identification, which makes, up to this point, the sum total of the evidence in the case.

I shall refer to exhibits when I have pointed out the witnesses that have come here. Our next witness is Mr. Eustice, and he was here a long time. As a matter of fact, he was here so long I thought this was going to be a court of Eustice, instead of a court of justice. But, nevertheless, during that long period of time he was here, I think at least one-third of these volumes represent Mr. Eustice's testimony.

There isn't one word of Mr. Eustice's testimony against the defendant Phillip Himmelfarb. He must be eliminated entirely. You will recall that, with respect to each of the witnesses that I have mentioned up to this time, including Mr. Eustice, there was no cross-examination except—it wasn't actually cross-examination—except that I did, with respect to Mr. Eustice, at the outset of his testimony, take him on [1487] preliminary or voir dire examination with respect to his record, to establish their incompetency; and the reason that there was no cross-examination with respect to the previous witnesses up to this point, and Mr. Eustice too, is because no direct testimony had come in from any of those witnesses against the defendant Himmelfarb. Consequently, there being no direct testimony, there was nothing with respect to which he could or should have been cross-examined.

The next witness in the case was Mr. Gorgerty. That was the insurance broker. The sum total of Mr. Gorgerty's testimony, in substance, was that he had written a policy for Mr. Himmelfarb; that Mr. Himmelfarb had called him in for the purpose of having that policy transferred. That he introduced Mr. Ormont to him as his partner, and asked him to transfer this policy to the Acme Meat Company, showing himself and Mr. Ormont as partners.

We add that testimony to what we have already in the case to make up to this point the sum total of the evidence against the defendant Phillip Himmelfarb. I shall go into the matter of those exhibits in a bit.

The next and the ninth witness in the case was Samuel Phoebus. He testified against the defendant Ormont only. Not one word of his testimony is against the defendant Phillip Himmelfarb. We must eliminate him.

The tenth witness in the case was Frank Smith. He testified against the defendant Ormont only. Not one word of testimony came in as against Phillip Himmelfarb. As a matter of fact, that was the witness, if you will recall, who started to give his testimony and there was a stipulation as between Mr. Robnett and Mr. Strong that eliminated the necessity for the testimony. Consequently we eliminate Mr. Smith.

The next witness in this case was Mr. William Malin. He is the eleventh witness. The only testimony that Mr. Malin gave that came into the case as against the defendant Phillip Himmelfarb is to

the following effect: that he sent the letter and the affidavit that Mr. Strong read to you to Mr. Bircher, that he saw Mr. Himmelfarb sign his signature to the letter, that the information on the affidavit and letter was obtained from Mr. Himmelfarb; also the statement appearing in the net worth statement, the facts appearing in the net worth statement; that he prepared Exhibit 6, that the [1489] information with respect to the joint venture, the miscellaneous enterprises, came from the attorney, that the information respecting the income came from the attorney Mirman, that the information respecting the division of the income came from Mr. Mirman and Mr. Ormont. That is the sum total of Mr. Malin's testimony against the defendant Phillip Himmelfarb. We add that to the previous testimony to make up the sum total of the evidence upon which you must, under your oath and under your instructions of this Court, consider and decide this case.

The next and twelfth witness, and the last witness presented by the government, was Donald Bircher, and Mr. Bircher testified in the case as against the defendant Ormont only. We therefore eliminate Mr. Bircher.

The sum total then, ladies and gentlemen, of the evidence in this case that we have is that bit of testimony from Mr. Link, which in answer to questions put by the Court establish the fact, in so far as Mr. Link was concerned, that there were payroll checks issued to Mr. Himmelfarb and that Mr. Himmelfarb worked at the Acme Meat Company.

So far as the witness Gorgerty is concerned, whatever the reason may have been for requesting him to transfer the insurance, whether it was better or easier to transfer to the Acme Meat Company on the basis of a partnership than it would have been on any other basis, the only testimony there [1490] is the statement that Mr. Himmelfarb introduced Mr. Ormont as a partner.

It is not a crime, it certainly doesn't constitute the crime of evading income tax, to receive payroll checks, to work at the Acme Meat Company or any other place, nor is it any crime, nor is it a crime of evasion or attempting to evade income tax, to ask an insurance broker to transfer a policy from an individual to two individuals, whether as partners or otherwise, whether it be true or untrue, that they are or are not partners. We cannot spell any crime out of any of the testimony up to this point.

And certainly the testimony of Mr. Malin with respect to the letters and the net worth statement, that testimony whether added to or taken by itself, doesn't establish any kind of a crime, whether it be evading income tax or anything else, and we of course here are concerned with this problem: the burden is upon the government to prove to you beyond a reasonable doubt and to a moral certainty that the defendant committed the crime charged in the indictment.

Now let me take up the exhibits, if you will, please, because you will find upon examination of the testimony in this case that no semblance of an offense has been shown, and certainly not the type

and kind of evidence or testimony that should or could convince any reasonable person beyond a reasonable [1491] doubt as to the commission of such an offense.

I call your attention first to Exhibit 4. That is the income tax return filed by the defendant Phillip Himmelfarb for the year 1944. No one has come into this court, not one witness has uttered one word, that the information appearing on this return is not true or correct. There is nothing on this exhibit that indicates that the information thereon is not true or correct. If a mere return such as this spells out a crime then that crime must appear in every income tax return that is filed because it is no different a return than the returns that are filed by individuals reporting on a cash basis and on a calendar year basis. There is no crime there. So we add it to the other testimony, add it to the other evidence, and we have no crime there.

Exhibit 5 is a calendar year return for Mrs. Himmelfarb for the year 1944, the same type and kind of a return that husbands and wives filing separate returns file year after year. Not one word of testimony has been uttered in this case that these figures are not true or correct. Add that to the rest of the testimony and we have no crime, no offense of any kind or character.

The next exhibit is Exhibit 6. That is the joint venture return. If you will look at it, it is headed up "Partnership Return of Income for the Year 1944." It sets forth joint venture income. Has any witness in this case taken the [1492] stand and ut-

tered one word as against the defendant Phillip Himmelfarb that the information set forth herein is not true or correct? Who was that witness that uttered that one as against the defendant Phillip Himmelfarb? It hasn't been said. It hasn't been uttered. No such witness was presented in this case. And this return is an information return, and you will be instructed that there is no income tax due and payable in connection with such a return. This is filed as a matter of information only. It is filed to disclose the individuals to whom income is distributed. The income that is payable in connection with an information return is payable by the joint venturers or partners to whom distribution is made in the calendar year following the calendar year in which the fiscal period ends.

This sets up a fiscal period of May 1, 1944, to July 5, 1945. Therefore the fiscal period ends in the calendar year 1945. Therefore the tax due by the partners or joint venturers need not be reported and paid by them until they file their personal calendar year return for the year 1945 on or about March 15, 1946.

Add that, if you please, to the rest of the testimony in this case that has come in against the defendant Phillip Himmelfarb and you must decide it upon the record, upon the testimony in the case as against him, and you have no crime, you have no offense. [1493]

Now ladies and gentlemen, you of course can't go beyond this record and consider any other testimony. It must be based upon what is in the record.

Mr. Strong, at the outset of his case, made an opening statement. I would like to refer to that. He said to you in his opening statement when he first addressed you:

“As to count 2 we will show that Mr. Himmelfarb filed an income tax return covering the year 1944 and he also stated what he said was his income and stated what he said was the tax. Now the only thing that is difficult about that, the only thing that the government says is wrong with that, is that he didn't tell you the whole story on that return. He left out a lot of income. We are going to show you this extra income. We are going to show you that there was extra income and that it was the kind of income on which he had to pay a tax, and he had to report it and he didn't do it. That is all there is to it.” [1494]

Where in this record, ladies and gentlemen, as against the defendant Phillip Himmelfarb is there any evidence that he didn't tell the story on that return? Where in the record in this case as against the defendant Phillip Himmelfarb is there the testimony of any witness, is there any evidence of any kind, that the defendant Phillip Himmelfarb left out a lot of income? What witness, if you please, testified one word to that effect? What evidence is there in this case that has proven to you beyond a reasonable doubt that there was any additional income that was not reported in the 1944 return, for the year 1944? By what witness and with what evi-

dence has he shown to you that there was extra income earned in 1944? Has any witness taken the stand that the prosecution has called that so testified? Not one word has been uttered.

Mr. Strong knew that, and what did he do? He referred to the testimony of Mr. Kibbee, who was called in by Mr. Himmelfarb, and there is an interesting story in connection with that, and this is what it is: In my opening statement, ladies and gentlemen, I said to you:

“I believe that the evidence will show that the defendant knows no more about the intricacies and complexities and ramifications of income tax returns than you and I * * *”

And I went on to say that “consequently like most of us [1495] he goes to bookkeepers and auditors and so-called tax experts.”

That evidence is here before you. If you will take a look at these exhibits you will find—well, take Exhibit 4 for instance—there appears on it a statement, “Signature of person other than taxpayer or agent preparing return,” and there is a signature that appears to be W. Moody on that return which establishes it is someone other than the defendant Himmelfarb who prepared that return.

Looking at Exhibit 5, the same thing precisely is true. That is established by the exhibit itself.

Looking at Exhibit No. 6, that is the one that the testimony established that Mr. Malin prepared, and there is in connection with that a statement that it was prepared by the accountant.

The same thing is true with respect to Exhibits GG and Exhibit HH—every one of these returns show on their face that they were prepared by someone other than the defendant Himmelfarb, other than the taxpayer.

But going on beyond that, I had made the statement to you during the course of my opening statement:

“You know that as you pay the taxes increase depending upon the income bracket in which you fall, and that the reduction of the 1944 tax brings the amount to a lower point for 1945 than [1496] the addition of the same amount to the 1944 tax would bring him up in the way of bracket, and consequently under the Government’s contentions, and as I understand those contentions up to this point, on the basis of their own evidence it will show that there not only has not been a failure to pay but that the result is an overpayment of tax. Consequently a lesser amount was due in 1945 than was actually paid, a greater amount if the Government is correct would have been due in 1944 but the total amount for both years by the defendant Himmelfarb is less under the Government’s claims and contentions, the evidence will show, than the total payment by the defendant Phillip Himmelfarb.”

Now I said in my statement that I would prove that by the Government’s own witnesses. Well, ladies and gentlemen, I must confess now that I was

mistaken. I assumed that when Mr. Strong made his opening statement that he had some testimony to back up what he said, and I knew that if he put any witness on the stand that would testify with respect to these returns against the defendant Himmelfarb that I could by that witness' own admissions prove the fact that I brought Mr. Kibbee in to prove. But, ladies and gentlemen, the prosecution never brought in such a witness. But to keep the statement [1497] and promise made in my opening statement to you I called Mr. Kibbee into the case, and when I called him into the case I was in the position that there wasn't any evidence in this case against the defendant Himmelfarb respecting any amount of income, so we went to their indictment, which merely is a charge and does not prove anything—it isn't evidence—and we took from their indictment the amount that the prosecution tried to establish and never did and couldn't establish, and using first that figure Mr. Kibbee made some calculations, and he assumed for the purpose of those calculations the figure that the Government alleged but has never proven in this case.

And what is the result?

“Q. What is the total amount of the tax as recomputed by you upon the basis of the net income as shown in the 1945 return less the amount of \$13,641.11 as allocated to 1944?

“A. The total tax is \$1881.85. .

“Q. What is the total amount of the tax for the years 1944 and 1945 as shown by the re-

turns for those years as filed by the defendant Phillip Himmelfarb? A. \$8891.97.

“Q. What is the total amount of the tax for the years 1944 and 1945 as recomputed by you upon [1498] the addition of the \$13,641.11 to 1944 and the deduction of the amount from 1945?

“A. The total recomputed tax is \$7725.78.

“Q. Mr. Kibbee, what is the difference in dollars and cents between those two figures?

“A. \$1166.19.”

He was then asked:

“Q. With respect to the returns for 1944-1945 as filed, does that amount which you have just given as a difference represent an overpayment or underpayment?

“A. It would result in an overpayment.”

Having gone and taken the figure from the indictment, which has never been proved, has never been established; no figure has, of any kind, and placed before this Court, no matter how it were calculated, we have Mr. Kibbee assume, just for the purpose of calculation from a breakdown based upon the apportionment, he said, in 1944, to the total income, and in 1945, that too, upon a recapitulation, resulted in an overpayment.

Mr. Kibbee never testified, nor has anyone testified, that any amount of money was actually earned in 1944; and there is no such evidence before you in this case. But to establish the statement that he told you would be established, and it would be

established by Government witnesses who would testify to income, but there is no such testimony, and we brought in a witness to prove it. And that, ladies and gentlemen, is the fact with respect to that matter, and there isn't such a thing in this case as Mr. Kibbee having established and proven any income for 1944.

As a matter of fact, Mr. Strong said, all you are doing, is assuming a figure? Yes.—You don't know of your own knowledge? Obviously they were assuming figures from the indictment, in one case, and on an apportionment in the other one.

Ladies and gentlemen, the defendant in this case is accused of a grave charge, and in determining that you must, and can [1500] only look to the record, and to the instructions of the Court. And the Court has repeatedly instructed you during the course of the trial, that the evidence was admitted as against one defendant only, and you must not consider it as against the other; and that follows with you, and carries through into your deliberations in the jury room. And consequently it will be necessary for you to determine where in this record is there a record against the defendant Phillip Himmelfarb, that convinces you beyond a reasonable doubt, and to a moral certainty, that he prepared and filed a false and fraudulent return?

Has there been one word of testimony in this case, from any witness, that the defendant, Phillip Himmelfarb, prepared a false and fraudulent return? Who is that witness? Where and when did he testify? It does not appear in that record. Where in

this record is there any evidence against the defendant Phillip Himmelfarb that can convince you beyond a reasonable doubt, and to a moral certainty, that his net income for the year was \$17,752.65, and that the tax thereon was \$5,843.91, as charged in the indictment, or any sum substantially similar to that?

Has there been one witness that has come into this case and uttered one word to the effect that Mr. Himmelfarb's income for the year 1944 was as is charged in the indictment, \$17,752.65, or any other sum; or has anyone testified to any [1501] amount whatsoever? It has not been in this case, and it isn't in that record.

Has anyone testified in this case—has there been one word uttered, that the tax due for the year 1944 actually was \$5843.91? People cannot be convicted upon conjecture, guesswork, surmise, or suspicion.

Where is the evidence that will prove those things? Where in the record is there any evidence that the defendant Phillip Himmelfarb concealed, or attempted to conceal, from the Collector, or any other person, his true and correct net income for the year 1944? Has there been any witness that uttered one word to that effect? Did Mr. Eustice do it? Did Mr. Phoebus do it? Did Mr. Bircher do it? Did anyone else do it? The answer is, no, there has been no such testimony, and it is upon the evidence in this case that you must decide the case.

Has there been any evidence before this Court that can convince you beyond a reasonable doubt and to a moral certainty that the defendant Himmelfarb concealed; or attempted to conceal, his true and cor-

rect gross net income? Where is that witness? When was that word uttered? There isn't any testimony. There isn't any evidence that the defendant Phillip Himmelfarb filed a false and fraudulent return. There isn't one word of testimony or evidence in this case that he evaded, or attempted to evade income tax for the year 1944, or any other year.

And where [1502] in this case has there been one word of testimony, where in this case is there one bit of evidence, that the defendant, in connection with these things, which the Government has charged—and he is charged only with attempting to evade income tax; he is not charged with anything else; he is not here for any other purpose—there is no testimony as to Phillip Himmelfarb. And so, with reference to the matter of his income tax return, where is there any evidence or testimony that he did any act willfully, or attempted to evade his income tax?

Ladies and gentlemen, the charge in the indictment is that the defendant filed, on or about March 14, 1945, a false and fraudulent income tax return. The income tax return that is referred to in the indictment is Exhibit No. 4, the return upon which he shows an income of \$9223.48, which was divided between himself and his wife, Mrs. Himmelfarb. The defendant in this case is not charged with filing a false and fraudulent information return, which is Exhibit 6 in this case. That is not the charge. That is not the accusation. There is no offense predicated, or attempted to be predicated, upon that exhibit, or upon the filing of this return. It is only

Exhibit 4 which is, and could be, the basis of any determination by you, and upon that return, which is the return which is charged to have been false and fraudulent, are you convinced, [1503] beyond a reasonable doubt, from the evidence introduced in this case, from the testimony of the witnesses I have delineated for you, are you satisfied beyond a reasonable doubt and to a moral certainty, that the defendant, Phillip Himmelfarb, did file a false and fraudulent return? That he did so willfully? That he did it for the purpose of attempting to evade income tax?

And that is Exhibit 6, that information return, and is an information return to disclose, and legally, in so far as the case against the defendant Himmelfarb is concerned. There is not one word of testimony that that disclosure, in so far as he was concerned, and that the filing of that return, was not freely and voluntarily done.

And the fact that he has gone to an accountant to have it prepared—all of his returns have been, and I presume, ladies and gentlemen, that you have returns that are filed for you by an accountant. And the fact that he went to an attorney—and Mr. Strong would have you believe that they got an attorney for the purpose of concealing, hiding,—and I presume you people have gone to attorneys and your have transacted legitimate business. At least, I can say I have had clients come to me for that purpose, and I am sure Mr. Strong did too when he was in private practice, or if he hasn't, that they will come to him for the same purpose when he is in private practice. [1504]

You will be instructed by the Court that the law recognizes that it is proper and legal to avoid the payment of income tax by any lawful means. One cannot willfully evade taxes, but to avoid the payment of them by legal means is legal; it is proper and it is lawful. Irrespective of all other matters, you must be convinced beyond a reasonable doubt from the evidence in this record before you.

Now, this is my last opportunity to address you. I will not have an opportunity to say one further word on behalf of my client. Mr. Strong will make a closing argument. It is my request of you, ladies and gentlemen of the jury, that you analyze that argument, consider the reasonableness of it, and particularly check him to determine if he is going outside of the record, against the defendant Phillip Himmelfarb, in an effort to construct a case by argument which he was unable to do by evidence. And I believe that you are going to find it necessary in your deliberations to check yourselves, and ask yourselves: Now, are we considering evidence that did not come in against the defendant Himmelfarb? And you may find it necessary to check each other in that regard, because if you base your decision in the determination of his guilt or innocence upon any evidence that is not in the record and against him, your determination, obviously, is not, and cannot be in accordance with your oath and the instructions of this Court.

When you took your seats in the jury box you did so with [1505] the belief of the defendant's inno-

cence, based upon the presumption of innocence, which continues until you are convinced by the evidence in this case that he is guilty beyond a reasonable doubt and to a moral certainty.

Your oaths, and the instructions, require you to fairly and impartially try this case on the evidence presented against the defendant Phillip Himmelfarb. We have not the right, and we did not ask more of you, than that you do fairly and impartially, and determine the case against him upon the evidence in this case as against him. We have the right, however, to expect no less, because you will do your duty as jurors in this case, and because there is, upon the evidence and the record in this case, only one conclusion which you can come to as against the defendant Phillip Himmelfarb.

You must find him not guilty. Thank you.

(Here followed discussion outside the record.)

The Court: We start at 9:30 in the morning. Recess until 9:30. Remember the admonition. [1506]

(The following proceedings were had outside the presence of the jury:)

The Court: The additional instruction that was submitted, was that prepared by you?

Mr. Strong: No.

The Court: Do you have any objection to it? It seemed to me to be agreeable.

Mr. Strong: I haven't read it over. I also have a few additional ones that I will prepare tonight and bring in tomorrow.

The Court: We should have had them before.

Mr. Strong: I just saw things developing in the argument which I think ought to be covered.

The Court: I do not think so.

Mr. Strong: Well, your Honor, for example, Mr. Katz constantly refers to testimony as being the only evidence. I think there should be an instruction that not only testimony is evidence but other things are evidence. I think that ought to come from your Honor as a matter of law.

The Court: That is a general instruction.

There are two instructions that I thought I ought to add on my own motion which I thought about during the argument.

One is: "It must be kept in mind that this is not a civil suit to collect taxes in which you could decide the case by mere preponderance of the evidence, but the charges [1507] here must be proved beyond a reasonable doubt and to a moral certainty."

The other one is to add to Government's Instruction No. 5, after I tell them they are not to be concerned with the punishment which is a matter entirely within the province and is the responsibility of the judge, and the result of it in the event of a conviction: "Nor are you to be concerned with whether or not any tax which might be due will or will not be affected as the tax liability, if any exists, with appropriate civil remedies regardless of your verdict in this case."

Mr. Strong: I have no objection.

Mr. Robnett: That is agreeable, your Honor.

The Court: Very well. 9:30 tomorrow morning.

(Whereupon, at 4:40 o'clock p.m., an adjournment was taken until 9:30 o'clock a.m., Friday, June 13, 1947.) [1508]

Los Angeles, California, Friday, June 13, 1947

9:30 A.M.

(The following proceedings were had outside the presence of the jury:)

Mr. Strong: I have another instruction, your Honor.

Mr. Robnett: I don't think it is proper to give it.

Mr. Strong: That instruction deals with the law. It tells the jury what the law is in regard to the taxes.

The Court: I don't think this is necessary. It may be subconsciously that conclusion is induced in contemplation of reading all these figures to the jury.

Mr. Strong: The Circuit Court has said the jury is to apply the law to the facts. I want to eliminate that by having your Honor tell the jury how much the tax is. The defendants are charged with attempting to evade and defeat a substantial portion of the tax.

Mr. Robnett: I think the instruction is very complete, your Honor.

Mr. Strong: There isn't any instruction what the tax is. I don't know why Mr. Robnett said that.

The Court: There isn't any instruction on that, but to read this to the jury would be almost meaningless. Perhaps an instruction can be framed.

Mr. Strong: May I reframe it, possibly during the lunch hour? [1511]

The Court: A short and simple instruction on it would be:

In the event that they find that the income was not reported as claimed by the Government, then the tax for 1944 would have been higher for that year than was paid for 1944.

Mr. Strong: Can we give an approximate figure of tax?

The Court: No. If you paraphrase what I said: It would have been substantially more than was paid for the year 1944; because it is charged that it was an attempt to defeat and evade. It is not to determine the precise amount of tax that was due.

Mr. Strong: Since the record shows the defendants objected to the giving of this instruction anyway, I will rephrase it according to your Honor's statement.

The Court: The reporter can write up my statement just now, and knock off several carbon copies and hand them to counsel. The jury can be called down now.

We will take a short recess.

(Short recess.) [1512]

The Court: United States vs. Ormont and Himelfarb.

Mr. Strong: Ready.

Mr. Robnett: Ready.

The Court: Usual stipulation?

Mr. Strong: Usual stipulation.

Mr. Robnett: Usual stipulation.

Mr. Katz: Yes, your Honor.

The Court: Mr. Robnett.

Argument in Behalf of the Defendant Ormont

Mr. Robnett: If your Honor please, counsel, ladies and gentlemen of the jury: I know you will all be thankful to know that this is about the last time you are going to hear from me and you will be able to go home and stay there as far as I am concerned.

This case has been a long case, I know, and I have been blamed for it, I see. I don't know whether I was willfully blamed or otherwise, but the question of willfulness will be a very important matter in this case, not necessarily on the matter I am going to mention to you now but it is an important element, and I am going to mention this because I hope that there was no prejudice or anything intended. I don't believe there was. Anything I may say with regard to any of the witnesses, I don't think there is anything personal. I am trying to call it as I heard the evidence, and let the chips fall as they may. The same as to counsel. I am [1513] very fond of Mr. Strong.

Yesterday, however, he saw fit, if you will remember, to tell you what a long trial we had had and the long cross-examination that I put on witnesses here and all of the evidence that I had put in, and said to you, "What has that got to do with this case?"

Well, I don't know why that was brought up. You do know that I was long in cross-examination. I am representing a man here who has a serious charge against him. I felt it was my duty, and I make no

apologies for the time I devoted to doing the job as I thought it should be done, according to my little ability. Maybe someone else would have done it quite differently. I don't believe that Mr. Strong in doing that wilfully intended any prejudice at all. I don't believe he did.

You know, we do lots of things in this world and it may be that they are not just right, but if we don't wilfully intend wrong with them then we are not to be punished. So it is with the defendant Sam Ormont in this case. He isn't more than just a human being like you or me. I am not going to stand up here and tell you he is a little god, or anything of that sort; I am going to tell you though that he is a good citizen. He makes mistakes probably, we all do, that is human; he wouldn't be here, I don't believe, if he didn't, if he was perfect. But the question that is important, and [1514] all-important, in a case of this sort is the question of willfulness, if you did anything or omitted to do something. Was it willful and with a bad motive? That is important here.

Now I am going to take up with you first a little bit that I think should be cleared up before proceeding with the elements of the issues at hand. There were, as you know, originally four counts against my client, four charges. Mr. Strong yesterday in calling your attention to the long cross-examination and to a lot of evidence—he had a lot of checks and he said, “What has that to do with this case?”—he was correct. It doesn't have anything to do with this case to date. The day before

yesterday and the days that preceded that it had a lot to do with the case. There were three other counts in this case against my man. Those counts, as you know, my client stands acquitted of those. Therefore that evidence as to those years 1942 and 1943—and that was the long evidence—that evidence has nothing, as I see it, to do with this case at all. You are trying a question now as to 1944. Did Mr. Ormont willfully, intentionally, feloniously and wrongfully, for the purpose of evading tax, attempt to do something that would constitute an evasion of tax that he owed. You would have to find that from the evidence, if you find him guilty in this case, and I think I can show you that you couldn't possibly follow your oaths and the instructions of the Court and find him guilty on that count. [1515]

Now, let us go back to another matter. Counsel said there were a lot of things shown in the bank records of big deposits. I expect there are. I don't believe any human being can transact that much banking business, that is shown on these ledger sheets, and not make a lot of deposits. I wouldn't be surprised, if you took the time, or wanted to take the time to check it off, that you would find more than a million dollars passed through those accounts. It doesn't mean it's profit; it is income.

Counsel, if you recall, brought in Exhibits 24 and 15, I guess it was,—just a few pages of the account. You recall I said: Bring them all. There they are. There is nothing there never has been, in my mind that the defendant, Sam Ormont, kept from this jury, or kept from the officers of the Internal Rev-

enue Department any books or records. He has never tried to secrete anything. He puts his money in the bank, where they can find it. He knows they can find it. You know these officers, if they want to find out what you have in the bank, they have got the right to find out; and they found out. So, he wasn't hiding it. It was all open and aboveboard.

They take up the witnesses. Mr. Strong mentioned Mr. Eustice. He said he had made a thorough check of all the books and records, bank or otherwise. Mr. Eustice did not say that. If he did at any time, I didn't hear him. He didn't say that on cross examination, and particularly when his Honor, [1516] the judge, took these bank records and said to Mr. Eustice: Do you mean to say that you checked each and every one of these items, back and forth, as to wherever they came from or went?—Well, he finally said, the large ones. Enough to convince me.

You are not here to convince Mr. Eustice. You are trying a case here, and you have got to be convinced yourselves, from the evidence, beyond all reasonable doubt, and to a moral certainty, of these things. That's why we are here.

He said: Well, don't like \$250 or \$300. I didn't trace those out. No. The fact of the matter is he finally used two items in 1938, one for \$2,000. I didn't trace that out. And another for \$1850. I didn't trace that out.

A thorough check of all the books and records, as Mr. Strong says? Is that thorough? No. Yet his entire testimony in this case was based upon the theory that he had, by a process of elimination,

checked off all those things, and said they belonged in that category, and it leaves us with this situation, and my answer is that Mr. Strong has failed to account and report large sums of income or how to find out where he got them.

One of those, in 1943, they charge him with \$18,000. Has counsel proven that? No. There is an acquittal on that. In 1942, a great many thousands of dollars. An acquittal on that. 1944—he finally comes down to 1944 and says: Now, [1517] we will stand on this. He charges a very large sum.

He told you yesterday: We don't have to prove all the income we charge. That's right. Surely, his Honor will instruct you that that is correct, but I am quite certain that his Honor will instruct you, ladies and gentlemen, that when the Government comes in here, and charges one of their citizens with a crime like that, and says: You have been guilty of sequestering, defeating, and evading your income tax, or a large part of it, a large part of your income,—I have forgotten the exact amount they claim in this particular count; I think maybe \$30,000; No, the tax—it was some twenty thousand odd dollars,—the law says that they must prove substantially what they have alleged. They don't have to prove it to a cent, or even to a hundred dollars, where it is in thousands, maybe, but they must prove substantially what they have charged. They can't come in here and say: Well, we made a mistake. It was not half that much, but we still want to convict you. That is not fair to the defendant. He has a right to know what he has to meet, and to meet that.

They say: Well, there is some evidence in the record by Mr. Link, the former bookkeeper. There is. But the evidence of Mr. Link, taken altogether, does not prove it to you, as I see it.

Mr. Link has been the bookkeeper for Mr. Ormont for some [1518] 13 or 14 years. He only went there week ends, and picked up the invoices and certain books, the check book, or something of that sort. He kept most of the other books at home. That was the only time he was there—on the weekends. And they were not transacting much, if any, business then. He was not there during the week. But he made out Mr. Ormont's tax returns, year by year, for 13 years—13 years.

And the Government in this case, through the goodness and kindness of my client—he did not have to now, but he did—he threw his books open to them—all of them; all of the books and records. He did not know what they wanted to see. Mr. Phoebus had told him: We are here to see if you owe any more tax, or words to that effect. So he said: There are the books and records. He had them available, whenever they wanted them. They made a thorough search of them, and made such copies as they wanted to.

You can bet that if they could have found anything with a magnifying glass, they would have had it here, because that's what they have done; that is what they have tried to do. They are here, not to call them black when they are white, or white when they are black. They have called them black when they are white, in order to arrive at a conclusion.

All they [1519] have is a theory, and that reminds me a little bit of the two women who were talking, and they were married, and one of them said to the other one: "I always hear you calling your husband, it sounds like you say 'Theory.' Is that his name?"

"No," the lady said, "that isn't his name. His name is John."

"Well, why do you call him Theory?"

"Why," she said, "because he never works."

So theory never works. It isn't a thing that ever works out. You can have a theory but that doesn't make it a fact. And so here that is what they have, just a theory.

Now I am going to confine myself from here on to the evidence pertaining to 1944. What do we have? We have the witnesses, Mr. Phoebus and Mr. Bircher. You will recall they told of a conversation here in this building on the 24th day of May, 1945. At that time there was present also another representative of the Government by the name of Schlick—I have forgotten his first name if I ever heard it—he was here, I believe, when you people were selected. He was introduced to you. He wasn't called to the witness stand.

Now the Government knew that they were going to put in that kind of evidence, the kind of evidence that the law recognizes is very, very dangerous evidence, that is to say, trusting entirely to the memory of someone. How they remembered [1520] it. All people in remembering things and repeating them repeat them in their own vocabulary and language. You don't pretend to remember just word for word, if there is a lot said.

Now those gentlemen, what did they say Mr. Ormont did and said? Well, now, Mr. Phoebus—I liked him, thought he was a nice witness, very nice witness, very fair witness—he told as best he could recall some of the things that he recalled that he said were said there. I asked him if he remembered everything. Oh, no, naturally he didn't have a photographic mind, he couldn't remember everything. Well, that is right. We all know that. I don't think the human lives that can remember a conversation that happened two or three years ago especially one that long. He may remember some of the highlights and maybe the highlights that he thinks are highlights are not highlights. They were to him and therefore he remembered them.

Now let's find out what he said. He told you that Mr. Ormont told him—understand Mr. Ormont is there, he has not representation, he didn't bring any witnesses along with him, they have two sitting there with them, that is, there is three of them all told, that is all right, Mr. Ormont didn't object to that, he didn't say, "I won't talk before the three of you"; a man who was doing wrong wouldn't want to talk before two or three witnesses, he might not want to talk before [1521] any, but not a man who has done right or at least thinks he has done right. Mr. Ormont thought he had done entirely right in this whole matter, and he said, "That is all right." The only thing that he did say right at the beginning before he talked about income or any joint venture or anything of the sort, you will remember what Mr. Bircher said he told him, he said Mr. Ormont

said, "What about this? I don't want this to go to other departments. I don't want to lose subsidies, I don't want to lose licenses and such like. I want to know if anything I tell you here is going to be kept confidential with you folks." He was assured that it would. Upon that assurance then he talked and told them what his income had been.

Now they say, both of them, I believe used the term "overcharges" in places, but it is strange to say that they used also another term and said that he used it. If I may find it in the record. I don't like to make a statement, and I know that this has been a long trial, that you couldn't follow all of it and carry it in your memory, so I would like to read it to you.

On page 965 of the transcript I asked Mr. Phoebus on cross-examination this question and he gave this answer:

"Q. Now didn't he (referring of course to Mr. Ormont) tell you—" Maybe I should go back. We are talking now of this money, this \$35,000 or [1522] \$36,000. That is what they were talking about, you will recall. All right.

"Q. Now didn't he tell you that as an entirely side issue from the Acme Meat Company that on the 1st day of May, 1944, he and Mr. Himmelfarb entered into a joint venture?

"A. Yes, sir.

"Q. And he told you that the money, the \$35,000 plus, that he had received was received through that joint venture?

"A. Yes.

“Q. And he likewise told you, did he not, that they having entered that joint venture on May 1, 1944, that they decided to and were using a fiscal year for accounting for income?

“A He told me that they had that date filed a return on that basis.

“Q. Yes. You subsequently found that they had filed such a return, didn't you?

“A. Yes, sir.”

Now that is what the witness says that Mr. Ormont told him. They entered into a separate side issue, a joint venture. That is what Mr. Ormont thought it was. That is what he told him it was.

Now let's see if that isn't corroborated by another witness. [1523] There is Mr. Bircher. On page 1103, lines 12 and 13, Mr. Bircher was answering a question, and after stating considerable he then said: “That in addition they had this side venture.” That is his testimony.

By the way, you remember he was a man with a wonderful memory. He told you he remembered everything about the whole thing. He was asked to give the conversation, I didn't object when he went to answer it, and he talked, and I think it covers three full pages in the transcript in answer to that, without stating a thing that was said by anybody but Mr. Ormont. Apparently Mr. Ormont stepped in there, the other three were perfectly mute, and he just started right out and pushed all of these things into their ears. But in any event I will show you that the man's memory isn't that good.

On page 1103 I asked him and he said:

“A. He said he didn’t differentiate between the business of the Acme Meat Company and their overcharge collection. He merely said that in the Acme Meat Company they were to share their profits equally after the \$24,000, after which the legitimate profits of the business were to go to Mr. Ormont. That in addition they had this side venture of collecting overcharges and they would share 50-50 on those.”

Now the next question:

“Q. He did say that this was a side venture, [1524] didn’t he?

“A. No.”

Can you beat that for a memory? A man that could remember something that happened two years ago and tell you here for half an hour every word that was said by the defendant in this case and yet couldn’t remember 30 seconds what he had just sworn to on this witness stand. He just said up here, and that is where I got the word, he had just told you that in addition they had this side venture, and I turn around and ask him, he did say this was a side venture, and he says, no. Can you beat that for a man with such a remarkable memory?

In any event, I am not going into the question of whether this man or that man’s evidence was exactly as it should have been or anything of the kind. I know human beings too well. I know they can’t do that. They make their errors, and maybe Mr. Ormont made some errors. Are you going to

condemned him for that? He thought this was a side venture and told them so. He told them all the time that he believed it was a side venture. The reason he believed it was a side venture was because Mr. Himelfarb was his employee, working for him on a salary basis, and this other—I don't know where it came from, I don't know whether you do beyond a reasonable doubt and to a moral certainty, but in any event we will take the prosecution's own case as they argue it, their own witnesses, and that is they say that it came from the customers [1525] of the Acme Meat Company, that the customers of the Acme Meat Company paid, as they say—and they love to say it because it listens better in this kind of a case, from their point of view—they say “overcharges.”

I don't know what overcharges are. But the record in this case is that these moneys were not regular charges at all against any customer. Mr. Phoebus told you that Mr. Ormont told him some customers paid it, some didn't. Now if you are running a business and collecting overcharges, you are going to collect them uniformly or else you are not going to have any regular business of it. They came in and paid, according to Mr. Bircher's testimony, these people didn't always pay when the invoices were paid, they bought the merchandise, they paid for that one day, then maybe they would come back in a few days and hand in some money. In fact, he said they gave checks at times. That is the evidence in this case from Mr. Bircher.

Now the strange thing is this. The Government of the United States seems to have plenty of help in this matter, have had since 1945, they are still here in the courtroom, most of them, plenty of time to be here now, they had time then, they have gone out and spent months, months, as Mr. Phoebus admitted on the witness stand they had access to the books from the very beginning, they had access to the names and addresses of every customer of the Acme Meat Company, [1526] every one of them, and those are the ones that it is claimed paid this money. Where are they? Did the prosecution bring one of them in here? Has there been one customer that has gone on that stand and said that he paid Mr. Ormont or Mr. Himmelfarb one dime more than the invoices? Isn't that peculiar to you? It is to me. It is to me, in a criminal case, when they want to convict a man of a felony and yet the burden is upon them. It is not upon the defendant to prove his innocence; it is upon the prosecution to prove his guilt. And you folks sit here with the absence of such things as that. Can you sit here and say that you have an abiding conviction in your mind, one that will stay with you today, tomorrow, abide with you, that you are right in finding the defendant Ormont guilty of the charge in this case? What a simple thing it would have been for them to have come in and said, these people, yes, that is exactly right.

Now I don't care personally whether this was a joint venture, legally or not, whether it was a partnership or not. To me that is not the point involved.

Did Mr. Ormont believe that it was? He did believe that it was. He did believe that it was not a part of the Acme Meat Business and he didn't have it put on the Acme books. They kept their accounts though of it.

The reason he wouldn't is because he and his employee were in this, as to the Acme Mr. Ormont was the Acme. That is [1527] the reason. He was the Acme Meat Company. And on this he put this as the other.

Now it is true that they didn't keep much record but you didn't have to keep much record of that. Not much record of a thing like that need be kept because there was no outgo, according to the record, it was income. He recognized it as income. He filed it on a fiscal year basis. He paid for it according to a fiscal year proposition. And the record is here and his 1946 income tax was paid and is reported right on that income report that is in evidence, and was fully paid as was stipulated to in this case, and that was the way you may do on a fiscal year basis. Lots of people do that. And I am sure his Honor will instruct you that you may do anything to avoid excess taxes, so long as it may be legitimately done. It is being done all the time. Why some concerns form two, three or four different institutions, copartnerships, corporations and the like, so as to put some here and some there and split it up and they don't have to pay so much tax. They don't get up into that big bracket where the rates go about 90 per cent to the Government and 7 or 8 or 10 per cent back to the man who earned it. That

is legitimate. You may do that. Now he thought that is what it was and that is the way he reported it.

I will show you why he thought it. The Government says, and the witnesses say, that he told them all the time. Why? [1528] One of them says, Mr. Bircher, that he told him he bought bonds with it. But he didn't buy very many bonds in 1944, only \$5000 worth. I just cite this to you as varying with Mr. Phoebus. Mr. Phoebus said that Mr. Ormont said he put most of it into the bank accounts and back into the business right where the Government could get it all. But if he bought bonds with it, can you imagine—now, wait, you are sitting here and if you find this man guilty you know what you have done, you have said, now you are a man that evaded tax and you deliberately and willfully did it, and that was your intention to do that, that is the kind of a fellow you were—and yet do you think that this defendant was doing that when he would take the very funds that they claimed were the income funds that he should have accounted for and put them into bonds of the plaintiff in this case? Bless your hearts, the United States of America is prosecuting here and those are the bonds he bought, and they had a record of it. Do you think that a man that is going to cheat someone is going to turn right around and patronize that fellow with the money he stole from him? Why it is absolutely absurd. If you people can find on that kind of evidence that Mr. Ormont was guilty of evading tax in this case, I say to you that you should by your very next breath and therefore acquit him, say that the man

was insane at the same time. He wouldn't have common sense if he did a thing like that, and you know it. [1529]

And now, we have got to be reasonable in these things; just reasonable. This man has a fine reputation among those who know him, and you know that. You never, I don't believe, in all of your experience, if you have sat on juries, or if you have had occasion to check a man's reputation in his community, where he was doing business, saw anyone have a better class of witnesses testify to his good reputation than those who came in here, and testified for Mr. Ormont in this case.

I have lived lots longer than Mr. Ormont. I have tried to live halfway, or probably a little better than that. I think some people might speak well of me, but I wouldn't know where to go to get a group of witnesses that stood as high as these witnesses here, —the big positions these people held, presidents of big companies, bankers, all kinds of fine people—I wouldn't know where to get them to come in and swear for me like that. I am proud to represent a man that stands that high in his community.

Now, the Court, I am sure, will instruct you that a man who has a fine reputation and character, that that fact alone, when he is charged with a crime like this, would be sufficient to create a reasonable doubt in any reasonable person's mind. And I am sure that that alone here would do that.

He is presumed to be innocent all through this case. They could have checked back. They say they did go back to 1931. Do you find them saying this

man was bad? That he did [1530] anything wrong? When did he turn wrong, if he did at all? Can you believe that a man who stood that way with his fellow men, and accounted for his income tax year by year, and bought bonds, like he did—do you believe that that sort of fellow, all of a sudden, is going to say: I am going to cheat the Government? No. It is absurd, ladies and gentlemen. To me it is perfectly absurd.

Let us take another situation: When he went up there, bringing these things, his chief concern was that he did not want them to take it up with the Subsidy Department, because if they did take it up, and he was making substantial overcharges, maybe that department might think they wouldn't pay his overcharges. I don't know. I don't think his overcharges were illegal. But if they thought he was doing an illegal act, by making overcharges, you can't find him guilty of that in this case. You cannot use that against him.

The Court will tell you, if you believe he is guilty of that, and you thought he was committing a crime, that is not a crime he is charged with having committed here. That is not wilfulness. Wilfulness means to commit the crime he is charged with, because of intentional evasion.

I don't know whether he had good advice or not when he went to a lawyer. That is not for me to criticize. He did go to a lawyer, the evidence shows. Mr. Strong says he only went after the investigation started. Wait a minute, ladies [1531] and gentlemen; are you going to say: We are going to

find him guilty, just because he went at that time, and did not go before or after that time?

You must remember his fiscal year began May 1st, 1944, and ended on April 30, 1945. He filed this fiscal year,—that is, his declaration for the joint venture, I believe it was, on the 24th day of May, 1945.

Now, under the law he had two and one-half months, I believe; in any event it's two months—maybe some of you know more about it than I do, but two months he had in which to file that after the termination or end of the fiscal year, which would mean that he had until some time in July to file it. He did not have to file it on a specific date. He could wait. He didn't. He filed it then, and went up and told them: I have filed a joint venture, or: I am filing it.

He went to an attorney. Evidently the attorney did not feel that he alone was good enough an expert on income taxes, and he called in an accountant. That accountant appeared before you. His name is on that. It is in evidence here. His name is on the return. And he filled it out, and Mr. Ormont signed it, and it was filed.

He did not have to pay any tax then, you understand. He did not have to pay the tax on his portion of the joint venture, because it would not be due until 1946, four months, and there is in evidence here, his return, showing for 1946 that every [1532] dollar, in good faith, was accounted for, and the tax thereon paid. That is the record in this case.

And counsel may say that was late. I don't know. Maybe it was. I have done a lot of work for clients, on income tax returns. I have worked with other attorneys, and accountants, and I have tried to study the law on it, and I just can't keep up with it and the changes. First it is this decision, and then another one comes along the other way, showing that you don't even know.

I venture to say, if I had anything like a complicated return, and on Monday I would go to Mr. Bircher, and on Tuesday to Mr. Phoebus, and on Wednesday I go to Mr. Eustice, and they figure it out—I venture no two of them will figure it the same. They all have different ideas. That is the situation we have. Then the Government comes out with a lot of more forms. Jack Benny and a lot of them have had a lot of fun about income tax returns, and they are not far from right.

I know that I have been through a lot of those things, and it is just one of those things. But in any event, let us concede for the purpose of argument that Mr. Ormont should have accounted for the portion of income he received in 1944 from the joint venture, and he should have accounted for it on his 1944 return; let us concede that just for the purpose of argument, the amount I think he actually got out of that in 1944 was \$11,000 and some odd dollars. That's a far cry [1533] from twenty-three or twenty-four thousand dollars which Mr. Strong tells you he should have accounted for in 1944—their charge in the indictment. That is their charge.

Of course, the presumption, and it is a very violent one, the presumption is that every one knows the law; and we turn right around and find that nobody knows the law. There is no such thing. And the longer I work at it, and I have been through it a long time,—the less you know, and you know others don't know the law. We keep trying to get a better concept of it, but it would be very violent to a poor layman, and maybe some of you men know a lot of law; I don't know; but I don't think you would want to be tried for a crime on the strength of your knowing the law. Maybe you would find out you were mistaken. As we often do. The Supreme Court tells us quite frequently we were wrong; and maybe the next decision of the Supreme Court will tell you differently.

This man did not know. He had no wilfulness. How are you going to find wilfulness, with a man who goes right out in the open, and puts the funds in the bank, and puts them in bonds; never hides a thing. The evidence shows that he never hid one single solitary thing in this case. How are you going to say, not beyond reasonable doubt—I don't believe you can say at all that the proof in this case stands up to showing any guilt on the part of this man. Not a bit.

Mr. Bircher said he remembered the whole conversation, [1534] and he was told at that time that the only books and records were that Mr. Ormont had a little book. He asked him to let him tear out a page, so that he could copy off figures. He did. It is here in evidence, and that was the record.

There were no other records. That was the way it was kept. Yet, there was a man with a memory. He has a wonderful memory. I wish I had it, and could remember as correctly, and yet he must have inquired within two months thereafter, or thereabouts, for these very same things.

The Government has introduced in evidence Exhibit 51-C, the letter from Sam Ormont, signed by him, addressed to Mr. Donald Bircher, Special Agent, Federal Building, Los Angeles:

“Dear Mr. Bircher:

“In answer to your inquiry substantiating the amount of \$35,694.42 as my share of the profits from the joint venture, we kept a cumulative record. Each time additional amounts were received, those were added to the previous accumulated total.

“This record is accurate to the best of my knowledge and belief. No other records were kept.”

What did he need with them? Why did he inquire again, and ask for the letter, with that beautiful memory of his, when he told you of things more than two years ago, when he was on the stand, and yet he hadn't remembered it 30 days after.

So this man was perfectly willing to tell him. He told [1535] him, and he had in his own mind no intent. No matter what you have done; say you are wrong, but you do not know it was wrong, you don't hesitate on those things. That was exactly the situation here.

This man, Mr. Ormont, the defendant in this case, had nothing to hide; nothing to fear in his own heart. You can only judge him by that. I don't know of any evidence in this case that would warrant you finding beyond all reasonable doubt, or finding beyond any reasonable doubt that there was any guilt or intention on the part of Mr. Ormont in doing what was done here. He does not deny he did that. You will recall that I let everything go in. We did not hedge on this and that. The records are here. They have everything they needed from Mr. Ormont. He thought they were down there for just what Mr. Phoebus told him, to find if he owned any more tax. He said: Gentlemen, all I am interested in is not to lose my subsidy, or my license. But if you find that I am owing any tax, send me a bill, and show me wherein I owe it, and I will pay it. Can you beat that?

There is no evidence, so far as the record is concerned, that he was sent any bill for anything, excepting a bill charging him in this case, before the Grand Jury, that only hears one side of the evidence. That's the bill that was sent to this man.

All I ask on behalf of my client is fair play, just a [1536] fair trial; tried according to the way you, if you ever had to be tried, would want to be tried.

Every one of you answered the question his Honor asked you, if you were in the state of mind in this case that you would be willing to submit your case, or a case of one of your loved ones, to people in that same frame of mind, and you said yes. You would not be sitting here, if you had not. We be-

lieved you then, and believe you now. I am satisfied that you will treat this case just as you would want yours, or that of one of your loved ones treated. You would not want him convicted on guess, conjecture, on supposition, and theory. You would say: Mr. Government, if you have got a case, prove it. That's what you would want.

Mr. Ormont raised his right hand on the stand here. You saw him. There was no use putting him on about these conversations, because he had conversations. Whether those were in the exact words or not, I don't know. But I certainly was not going to ask about them. That is up to you. But the big element of the crime is: Did he not pay a tax? Or did he not report some income? That is the big element: Did you not report income that you should have reported, and did you intentionally and wilfully fail to report it? That's the thing. Not: Did you make a mistake? [1537]

People sometimes think, should I report it this year or the year before or the year after or something of that sort. If they are wrong in that you cannot condemn them for that because they had their belief in the matter and acted accordingly.

I am not going to worry you any longer because I am sure you have listened to this evidence very attentively and I am sure that you will treat this case as you want to be treated if you had to have a trial. And I do thank you, each and every one of you, for your kind attention.

The Court: Mr. Strong.

Closing Argument in Behalf of the Government

Mr. Strong: Your Honor, counsel, ladies and gentlemen of the jury: This is the last time I will speak to you about this case or in this case. When I am finished here his Honor will give you the law, the instructions, which you have to follow, as you know. Then the case is in your hands. Then my job is finished and your job begins.

Now my job is not to secure convictions, it is not to prosecute anybody to a definite result; my job is just to present the evidence. That is all I am supposed to do. It is your job to decide whether a violation has been committed, whether the indictment correctly charges that the law has been violated, and anything that I say about the evidence is just comment on my part, it is just argument. As I have told you [1538] before, if your view of the evidence disagrees with mine, you pay no attention to mine at all. I am trying to give you a summary of the evidence as I see it. But if you see it differently of course it is what you see that governs, not what I see that governs.

So I am going to take just the 30 minutes allotted to me, possibly less, to just tie up a few things that I think have been brought in as some more of those extra jigsaw pieces that I was telling you about, some more pieces that haven't got much to do with this case, that don't help you one way or another in deciding what the facts are in this case.

Of course you have to be convinced beyond a reasonable doubt, and the Government never asks you to

bring in a verdict of any kind unless you are convinced beyond a reasonable doubt. That is the law. His Honor will tell you about it. I am not asking anything different. I ask you to simply judge these facts on the basis of the law as his Honor will tell you, and then I ask you to ask yourselves whether or not you are convinced, not only beyond a reasonable doubt in this case but beyond every possibility of the slightest doubt of any kind—beyond all doubt. Is there any doubt at all as to what happened in this case?

Mr. Robnett says he likes me. I like Mr. Robnett too. Mr. Robnett has had a very difficult case here, and it isn't Mr. Robnett's fault. It has nothing to do with him at all. [1539] It is just the way the facts are. It is just the way the evidence is. There isn't anything you can do if the evidence comes in and clearly indicates something. There is nothing you can do about it except one thing, you can try to take someone's attention off of the evidence. And while listening to Mr. Robnett and also to Mr. Katz yesterday I was beginning to wonder who was being tried here anyhow. I thought that the defendants were Ormont and Himmelfarb. After a while it began to sound as though there was something that I was doing that wasn't right. Maybe I am one of the defendants. Then it is Mr. Eustice, he is not doing something wrong. And Mr. Bircher, something wrong with his memory. And even the Supreme Court, you can't even depend on them, they change their minds and you might get a different decision. And then of course the law, the law is complicated,

confusing. There are so many things to worry about, so many things to think about that have nothing to do with this case, and it is very easy to lose sight of the salient facts in this case, the facts that show beyond a reasonable doubt that the defendant Ormont unlawfully and wilfully attempted to defeat and evade the payment of a tax by filing a false return.

The facts show that the defendant Himmelfarb did exactly that as charged in Count 2. It is so easy to lose sight of those few salient facts if you start listening and paying attention to things that distract you, things like, this is not [1540] a court of justice, this is a court of Eustice, and Mr. Strong is strong but his case is weak. That is all right. It is funny. It is amusing. But this isn't a funny case. This is a very serious case. It is serious to the people of the United States and to the Government. It is a serious matter when you wilfully and unlawfully attempt to evade and defeat a tax, especially by filing a false return. That is a very serious matter. There isn't any room for levity in that.

We are not here on the basis of anything that might be funny or amusing; we are here on the basis of a very simple proposition: did these defendants do the things that we charge them in each of the counts, and if they did them, did they do them wilfully and intentionally, as we charge, or didn't they? Those are the things to be considered.

Now as I said to you at the outset, this is a simple case. It involves meat, the sale of meat by the Acme Meat Company, and in connection with that

sale of meat they collected money which was shown on the invoices and reported on the books. You heard that testimony.

Besides that, on the other hand, they collected some more money. They like to call it gifts. They like to call it something else. But you know what it is, it is overcharges, extra money on the side. Did they collect that as a special or separate venture? Was that a separate enterprise that they had, as though you would run one factory on one side of [1541] the street under one name and another factory on the other side where you are doing something else? No, the evidence here shows that it is exactly the same transaction. You sell the same meat, you get part of the payment with the left hand and part of the payment with the right hand. So of course after they got caught by the investigators, and the investigators came in, they have to get some other reason to explain this away to get out of something that they have fallen into. So they come up with the joint venture idea. We have talked enough about that joint venture.

Now the other counts, as I have told you and as his Honor will tell you, is not in the case. I did talk with reference to the evidence to the years 1942 and 1943. As I told you when I was discussing it, I wasn't talking to you about that evidence to show you that a violation had been committed in that year, because those counts are out, but I discussed that evidence because they have a bearing on wilfulness. The way a man transacts business, the way he conceals or doesn't conceal, the way he does things

with reference to prior activities in relation to his money and his income, that all tends to indicate whether he is acting wilfully or deliberately and with a preconceived notion when he fails to report a substantial part of his income for the year 1944. That all comes into the picture. You can take those things into account. [1542]

You can take into account the fact that a man who is in partnership, one defendant in partnership with another defendant, goes around pretending that he is not in partnership, that one is the employer and the other is the employee. Then you also can take into account the explanation that they make for that. The explanation they made to Mr. Bircher, the man with the marvelous memory. He has a good memory. I think you will find he told you substantially what happened in line with what Mr. Phoebus told you.

They explained why they didn't report themselves as partners, because it might embarrass them with some other Government agencies. And they explained to you why they would rather call these separate payments gifts, because it might embarrass them with some other Government agencies. Well, you know what they are doing here. They are selling meat, getting money with the right hand and the left hand, and they are reporting the money that they get with the left hand and not reporting the money that they with the right hand. It is as simple as all that.

Now you were told by Mr. Robnett about a million dollars going through those books and about

the accounts and all that money. You remember the reason I pointed out that Mr. Ormont had a lot of money in his personal bank account was because he testified that he carried a lot of cash because he was afraid of banks. I was just showing you that a man who was [1543] afraid of banks that carries \$10,000 or \$12,000, as he says, in his pocket, why is he depositing such huge sums in his personal bank account at the same time? Is he afraid of the banks or isn't he? And if he is afraid of banks, wouldn't you think he would put the lesser amount in the bank and keep the larger amount out?

Now you look at his bank account. You will find out what sums he deposited during the years he said he was afraid of banks and that he was carrying the cash, and if you don't believe that story then do you believe the story that he had any cash, that he had any money that he accumulated from the preceding years. Of course if he had money which he earned in the preceding years, it isn't part of the income for the year 1944. Our job is to prove that this money which we claim was part of the income for 1944 was part of the income for 1944. And it is such an easy thing to come in and say, "I had a lot of cash in my pocket years back, I have been carrying \$10,000 or \$12,000. That is what was used to buy bonds." What bonds? Well, he can't identify the bonds, but it was to buy the bonds. [1544]

Do you believe that or do you believe that that money was income in 1944, not only as Mr. Eustice testified but as the defendant himself reports on

his fiscal year return? If you want to forget everything that Mr. Eustice said and if you just look at that fiscal year return, which shows \$71,000 miscellaneous income for the year beginning May 1, 1944, and ending on April 30, 1945, and just take 8/12 of that amount, and you will find out how much he earned that year in addition to what he reported. You don't have to look at the books, you don't have to listen to Mr. Eustice, you don't have to listen to anybody. They show it themselves on their returns.

And then you are told by Mr. Robnett that it is ridiculous for a man to invest his money in the plaintiff in this case, when the plaintiff is charging him with violating the law. Who is the plaintiff? The people of the United States. Where would you find a safer investment than an investment in the future of the people of the United States? I don't think you will ever find a safer investment than that. What difference does it make whether you put your money in the plaintiff's bonds or somebody else's, as a matter of fact. The question isn't, did he buy bonds that somebody could check or did he put it in an account or anything like that; the question is, did he report that money on his 1944 income tax. That is the question. And the answer obviously is no, because [1545] he himself indicates it on some other return.

Then the question is, did he willfully attempt to evade and defeat the tax for that year by filing a false return for 1944. That is the question. It has nothing to do with whether you bought bonds openly or you didn't buy bonds openly.

Mr. Eustice, as Mr. Robnett told you, did check some larger amounts and smaller amounts, but let's get a little more precise on that testimony. You will remember he told you that as to the years which are covered by this indictment, that is, the years '42, '43 and '44, that he checked every item in and out and tried to trace it, but that he also checked as far back as 1931, and on some of those older accounts he only checked the largest amounts.

Now I say to you that the mere fact that Mr. Eustice in checking to find out whether that income was earned in 1944 went all the way back to 1931 to see if there was a possibility of somebody accumulating money, that in itself indicates the completeness and thoroughness of his examination.

As to Mr. Link's testimony, did you hear any contradictory evidence from Mr. Link's testimony? If you did, then you heard something that I didn't. I don't remember a single word of contradiction as to Mr. Link's testimony. Whatever it may be, whatever weight you may give it, whatever weight you may decide not to give it, one fact is that there isn't any contradiction to it. None. [1546]

Now I am taking these up haphazardly because that is the way I have written them down, as they went in, and I simply want to cover some things that I think might tend to confuse as some of these extra pieces going in.

Mr. Robnett mentioned that the law recognizes memory testimony as dangerous. Well, that is the best kind of testimony there is. What a person saw, what he heard. How else would he tell it to you

except as he remembers it? As a matter of fact, if he writes it on a piece of paper he can only use that to refresh his recollection, and then he has to testify to what he himself remembers. And as to the contents of written documents, you can't have anybody testify as to the contents of them because those documents are the best evidence of what they say. Remember Mr. Katz arguing yesterday that there wasn't any testimony, only documents? Mr. Robnett is arguing today that memory is no good. In other words, testimony is no good. Well, if testimony is no good and the documents are no good, is there anything that is good as evidence. There isn't anything left, as a matter of fact. You can never have a case because you would have no evidence.

I will get to Mr. Katz in a few minutes.

The testimony of Mr. Phoebus, Mr. Bircher, completely uncontradicted, not a word in contradiction—and I just want to call it to your attention—isn't what Mr. Phoebus or Mr. Bircher testifies to what they saw? Both of them are testifying [1547] as to what the defendant told them, and just because the defendant said to them he only earned \$11,000, that doesn't mean that he only earned \$11,000 extra that year. All that means is that that is all he told them, but he may have earned more, and the income tax return, the fiscal year return, if you take 8/12 of that you will find that it is closer to \$22,000 and not \$11,000. [1548]

But even if it is \$11,000; let us take \$11,000, which he admitted he earned in 1944. That's enough.

We don't have to prove the precise figure. We just have to show a substantial amount.

We are charging intent to evade and defeat, by filing a false return. Is his return for 1944 any less false, because \$11,000 was left off of it than it would be if \$22,000 were left off? Does it make it any less or more false one way or another? It is false because he has not got the full amount in. Only a few pennies would not make any difference; in fact, only a few hundred dollars would not make any difference.

Through the story got through Mr. Bircher, he figures it is \$11,000. Do you think anybody who reports income, as Mr. Ormont did, for the year 1944, of \$12,000, and leaves off \$11,000, is not filing a false return? He is reporting only half, according to his story, and only one-third the amount we say was not reported.

It is true that Mr. Bircher and Mr. Phoebus testified that Mr. Ormont told them that he had a joint venture. When did he tell it to them? The afternoon of May 24th. On the morning of May 24th he filed a joint venture return. On the 21st they had gone to some accountant to prepare a return. Prior to that they had gone to see an attorney. He talked to the accountant, and then the accountant, after the attorney talked to him, went to see the defendant, at his home, or somebody's home, on the night of the 21st.

Did the preparation of a return in this case require seeing an accountant? It was not complicated; there are not enough words to cause a com-

plication to anybody. They gave: Miscellaneous income, \$71,000.00. Nothing for deductions. Then they skip a few pages. They divide it fifty-fifty. I submit to you, did they need an accountant to fill out that? Did they need one to unravel the complicated tax law?

There were no complications. It was all clear profit. There were no expenses attached to the earning of the \$71,000.00. The reason there were not any expenses was because all expenses were in connection with the amount reported. But it wasn't a separate venture. There we some sales of meat, and they only gave a part of those. It was on the amounts shown in the invoices, and the other is shown on the little piece of paper.

That is the whole point, when I say they went to a lawyer. There isn't anything wrong in going to a lawyer. Any person who has any doubts about the law, and would like to have them resolved, should go to a lawyer, and if he has anything he wants to know about income tax, he should go to an accountant. I don't say there is anything wrong in going to them. But I say it is in the circumstances surrounding the time. The investigation commenced about the 18th day of May. They wanted to examine his books, to know if there was anything due. So [1550] he starts to rush around. He rushes to an attorney; talked to him. We don't know what they talked about, because that is a privileged communication. That attorney talked to the accountant. After all this palaver, all this talk, all these conversations, what do we get in the return? It says: Miscellan-

cous enterprises; miscellaneous income \$71,000.00. It's the time that is important, the timing of these things.

That afternoon, after they filed the return, surely they came upstairs the same afternoon. They filed it in the morning, and came upstairs and told Mr. Bircher and Mr. Phoebus, and told Mr. Slick—by the way, he is on his honeymoon—and these other people: We filed a return this morning. We are going to pay the tax. The question isn't whether they paid the tax eventually. The question isn't whether they are now owing any money to the Government. But the question is, when they filed the income tax return, did they state the correct income, or pay the correct tax?

The problem is here: Did they unlawfully and wilfully attempt to evade and defeat a tax, when he filed his return, as charged in the indictment?

Mr. Robnett says: Where are the customers? You remember the testimony. Mr. Ormont was asked about the customers; he was asked by Mr. Bircher and Mr. Phoebus to give them a list of customers, so they could check. No customer list. When this case was in trial, why did he have to bring in a list of [1551] customers, when they themselves filed a return for the fiscal year, which shows how much money they made; shows at least as much as we charge. They sent a letter, through their accountant, telling almost exactly in substance what we are telling you here.

In this letter there are no other books. The book they have is a cumulative record. What cumulative

record? That piece of paper shown to Mr. Phoebus, and Mr. Bircher. That is the only record, Mr. Ormont told them. Every day he writes down this sum, and keeps the total. Listen to the instructions of the Court, and decide for yourself, whether that is the kind of a record an accountant could possibly honestly come in and base a fiscal year return on.

You know, accountants are supposed to know about the law too. They know that kind of a return can't be filed unless they have a record of the type his Honor will instruct you on. I submit this is no record. You can't check it; you can't do anything. It is a piece of paper with cumulative totals.

Mr. Robnett said Mr. Ormont was honest, and believed this was a joint venture, and was not a part of the Acme Company's business. I won't even discuss that. Mr. Robnett also said that the reason Mr. Ormont knew it was not part of the business was because he was the employer, and Mr. Himmelfarb was the employee. Is that true? Don't you remember Mr Gorgerty, when they wanted to insure their stuff, they insured it in a [1552] way that was truthful, and the way they wanted that insurance in case it was needed. Payable to whom? Sam Ormont and Phillip Himmelfarb, co-partners, doing business as the Acme Meat Company.

You remember what Mr. Ormont told Mr. Bircher and Mr. Phoebus. He said that their relationship was that of employer and employee, because it might embarrass them if it went to some agents having to do with subsidy. I won't go into that, because Mr. Robnett told you about the subsidy.

Whatever reason, that is not the fact. There was concealment right down the line.

Of course, his Honor will tell you, if you can figure out your taxes, and what you owe, on a basis that you pay less, not more, that it is right to do it. But you can't evade it. You cannot do it illegally. You cannot do it by failing to disclose to the Income Tax Collector what your income was. You have to do it by putting down your income, and deductions, and not by putting it on a fiscal year basis, after you are caught, and just in the nick of time, giving him some balance. If you have a fiscal year venture you do it as required. If you have a fiscal year venture, if it is the same business, and you are taking money with one hand, and money with the other one, you cannot do it by a fiscal year venture, or a joint venture, pertaining to overcharges on the sale of meat. [1553]

There were a lot of witnesses dealing with reputation of the defendant. They were all very nice people. I am certain that if any one of you, as members of the jury, were associated with someone, somebody you know, concerning whom you have not heard anything bad, and you were asked to come down and testify to the character of the witness: Have you heard anything bad about him? Do you know his reputation? Surely, you would go and you would testify for him. Why not? If a friend or business associate of yours was in the same line of business, selling meat, one of your associates, even if it were with reference to concealing some income received from overcharges on the sale of meat, side

money, surely, you would testify there was nothing wrong. But the thing is, in these cases the violators don't walk around with a sign on saying: My reputation is good. You don't know what they are engaged in, that they are concealing something from the Government. They are not going around telling their friends and business associates. You believe them to be perfectly honest and reputable people. You know nothing about those activities, and these witnesses come in and say they know about the man's reputation, and that it is fine, wonderful. He pays his insurance. He pays his premiums. He is a good man. Do they know anything about these other facts? No. [1554]

Do they know anything about these other matters? Two of those people testified that they knew the defendant's reputation in the community. When I asked them who they had talked to, well, they never talked to anybody. A person's reputation in the community is different from what you personally think of him. You may think he is a good man and yet the community at large may give him a different reputation. At least two of those witnesses indicated that although they testified that his reputation in the community was good, they really didn't know his reputation in the community. They never talked to anybody about him. How could they know his reputation? But those people weren't doing it deliberately, I am certain of that. They were asked the question, Do you know his general reputation in the community? Sure, I think

he is a fine fellow. You answer yes. That is the danger of those questions. That is the danger of reputation testimony.

Reputation testimony, if it creates a reasonable doubt in your mind, of course is the type of thing that should be gotten in by the defense, and if you have a reasonable doubt about the defendants' guilt, it doesn't make any difference how you got that reasonable doubt, and his Honor will tell you that you have to be convinced beyond a reasonable doubt. But are you going to take reputation testimony, general testimony, and say that that is enough to create a reasonable doubt [1555] in a case like this, a case where the evidence of the wilfull attempt to evade and defeat is as clear as you have it here? That reputation testimony should be like water off a duck's back. It doesn't mean a thing. Those people don't know anything about this man's operations with reference to his income.

Well, I have very little time left, and I think I will turn to Mr. Himmelfarb. Do I have 10 minutes at least, your Honor.

The Court: About seven minutes, because after you conclude we will take a short recess and then I will instruct the jury. That will take us until about 12:30, if you conclude in about that time.

Mr. Strong: Very well.

Now you heard the argument of Mr. Katz. Mr. Katz is laboring under precisely the same difficulty that Mr. Robnett is. He is a very fine lawyer but his client hasn't any case in defense. That is the trouble. And the government's case is pretty strong. So you talk about something else.

What did Mr. Katz talk about? He talked about this is a court of Eustice, not a court of justice; Strong is Strong but his case is weak—things like that. And then Mr. Katz goes on and tells you that there isn't any evidence in this case, no evidence he says. What about those records? Aren't they evidence? What about the letter that I read to you yesterday [1556] which was signed by Mr. Himmelfarb. Isn't that evidence? It has his signature on it. It tells about the money. They have no books and records. How did they distribute it? Oh, every now and then. How much money? Isn't that in evidence? Take 8/12 of that money that he has on his income tax return, the fiscal year return for 1944, Government's Exhibit 6, and it states on there, over Himmelfarb's signature, that he will get 50 per cent of that \$71,000. Isn't that evidence? Take 8/12 of that amount and you get about \$22,000 earned in 1944. Isn't that evidence? How about his bank account. That is in evidence. Of course nobody testified as to those books. If the books show on their face what they purport to show, if the records are clear, you can't have testimony. The books speak for themselves. That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case.

Mr. Katz keeps telling you, not a word of testimony, nobody testified, not a word of testimony. I began to think that maybe he thinks the only kind of evidence that is good in any case is testimony evidence. But you know that isn't true. There are several kinds of evidence. One is testimony of wit-

nesses, that is good; the other, just as good, are the books themselves, the letters, the signed Internal Revenue statements—all these things, that is all evidence.

And there is nothing that says that you have to win a [1557] case only on testimony, nor is there anything that says you have to have testimony. You can win an entire case just on the basis of record evidence, if the record evidence proves to the jury beyond a reasonable doubt that the things that the government charged occurred did occur. That is all you need. That evidence is in the record, ladies and gentlemen of the jury. That money was earned through that so-called joint venture. Mr. Himmelfarb says so on that return, and the letters which he sent in through Mr. Malin. They are all signed by him. You can examine them.

Then Mr. Katz tells you, look at these records. One was prepared by Mr. Moody, he is an accountant; and the other is prepared by Mr. Malin. So what? Where is Mr. Moody? He is the accountant for the defendant and he has something to say in the defense of the defendant, why didn't the defendant put him on the stand to testify? Why didn't they put Mr. Malin on to testify as to what he knows about that? I had him on the stand for a limited purpose, as much as I could get. Did they call him back? Was there something with reference to the preparation of that return which corroborates the defendant Himmelfarb? Why didn't they put Mr. Malin on the stand to tell you about it then? He is just as accessible to them as he is to me. And

if it is their defense, it is their witness. They didn't put Mr. Moody on, they didn't put Mr. Malin on.

You saw this business of the partnership. I am not going [1558] to go into that again. Both of them are partners, and on his return for the year 1944 Mr. Himmelfarb says under oath that he is an employee. Was he an employee? That is not what he told Mr. Gorgerty, that is not what happened when he got his insurance changed. Then he was a partner. But if it is convenient to say he is an employee, oh, well, what difference does it make whether it is under oath or not? He says he is an employee. Does that show that the man acts wilfully when he conceals things or doesn't it? Does that show that he is engaged in a wilful attempt to evade and defeat or doesn't it?

Then Mr. Katz kept repeating to you that there isn't any evidence, there isn't any evidence. It began to sound as though this constant pounding away was going to produce a result. How can it produce that result upon you when you have seen the evidence? You have heard it analyzed, you have heard it discussed. Can anyone say that there isn't any evidence? Can anyone say that there isn't any evidence from which you can find beyond a reasonable doubt that the defendant Himmelfarb committed the acts as charged in count 2 of the indictment?

I don't think so.

Now I am not going to discuss this any longer since I think I only have a half a minute left. It is now your job. His Honor will give you the instructions and I am finished. I have put in everything that there is and I think you will agree with

me that when I say to you that I have tried to put in everything I can, have. I have tried to explain to you what it shows. I don't think I have been unfair to the witnesses. I don't think I have been unfair to the defendants. I have tried to limit the matter just as much as possible. I have told you what that evidence shows, not to me as a lawyer but to me as an ordinary human being. If you want the kind of activity that was shown to have occurred in this case, if you want that kind of activity, if you think what Mr. Ormont did was proper and lawful and was not a violation of the law, as we charge, if you are not convinced beyond a reasonable doubt that what I tell you about these is right, then bring in a verdict of not guilty. It is as simple as all that. And the same goes for Mr. Himmelfarb.

If, on the other hand, you agree with me and if you have no reasonable doubt, if you are convinced beyond a reasonable doubt that the defendant Ormont did the things charged in count 1, and that he did them wilfully, and if you are convinced that the defendant Himmelfarb did the things charged in count 2 and he did them wilfully, then you will bring in a verdict of guilty as to Mr. Ormont on count 1 and a verdict of guilty as to Mr. Himmelfarb on count 2.

I thank you.

The Court: We will have a short recess and then I will instruct the jury. I want counsel to remain a moment to discuss [1560] a proposed discussion.

(The jury retired from the court room at 11:30 o'clock a.m.)

The Court: On the additional proposed instruction, I have written out the following which will come right after the Government's proposed instructions 1 and 2, which are a description of the charges:

“In the event you find that either defendant as to the particular count failed to report his true income in the amount substantially as claimed by the government for the calendar year 1944, then as a matter of law the tax for the calendar year 1944 would have been substantially more than paid by such defendant for the calendar year 1944.”

Mr. Strong: That is satisfactory to the government.

Mr. Robnett: That is satisfactory.

The Court: Very well. We will have a short recess.

(Short recess.) [1561]

The Court: Usual stipulation?

Mr. Katz: So stipulaated.

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, it now becomes my duty as a judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow that law as I shall give it to you. On the other hand, it is your exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law as I shall state them to you.

If in these instructions any direction or idea be stated in varying ways, or if a subject matter is treated first or last, no emphasis is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and to regard each one in the light of all the others. Nor are you to regard any repetition of an instruction as a special emphasis on that instruction. [1562]

Evidence may be either direct or indirect. Direct evidence is that which proves a fact directly in dispute, without an inference or a presumption, and which in itself, if true, conclusively establishes the fact in issue. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or a presumption of its existence. Indi-

rect evidence is of two kinds, namely, presumptions and inferences. A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive—and there are no conclusive presumptions in this case—a presumption may be controverted by other evidence, direct or indirect, or by another presumption, but unless so controverted the jury is bound to find according to the presumption.

An inference, on the other hand, is a deduction which the reason of the jury draws from other facts which are proved. It must be founded on a fact or acts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, or by the course of business or the course of nature. The word “propensity” as I have used it means any natural or habitual inclination or tendency. [1563]

You are not bound to decide in conformity with the testimony of any number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number of witnesses or as against a presumption or other evidence which appeals to your minds with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does not mean that you are to decide an issue by the simple process of counting the number

of witnesses who have testified. It does mean that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

The testimony of one witness, entitled to full credit, is sufficient proof of any fact, even if a number of witnesses have testified to the contrary, if, from the whole case, considering the credibility of the witnesses and after weighing the various factors of evidence, the jury should believe the one witness.

In weighing the testimony of witnesses it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or [1564] disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring, or an inclination to favor, any party. Was he, in other words, a biased or impartial witness? What degree of intelligence, what quality of memory, what grade of moral purpose, so far as concerned this case, were revealed by his appearance, manner of testifying, and all other evidence in the case? Was the testimony reasonable and consistent within itself and with uncontradicted facts? Was there any timidity, physical handicap, lack of ability in self-expression or other condition that placed the witness at a disadvantage or caused

his testimony to appear on the surface as being less trustworthy than it really was? Was the witness without fault of his own confused or embarrassed and thus placed in a light not truly representative?

Should you consider any of these questions, either in your own private reasoning or in open discussion, you must look for an answer only to the evidence admitted in the trial of this action.

Any evidence that has been received on an act, omission or declaration of a party which is unfavorable to his own interests should be considered and weighed by you like any other admitted evidence, but evidence of the oral admission of a party, rather than his own testimony in this trial, ought to be viewed by you with caution. [1565]

From time to time counsel for one or the other parties has interposed objections to evidence. Counsel not only have the right, but the duty to make any and all objections which are deemed advisable or appropriate, and no inference or presumption can or should be indulged in one way or the other by reason of the interposition of such objections.

At times throughout the trial the Court has been called upon to pass on the question of whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law, and in admitting evidence to which an objection might have been made the judge does not determine what weight should be given such evidence, nor does he

pass on the credibility of any witness. As to any offer of evidence that was rejected by the judge, you of course must not consider the same, and as to any question to which an objection was sustained you must not conjecture as to what the answer might have been or as to the reason for the objection.

The law does not require the accused to prove his innocence, which in many cases might be impossible, but on the contrary the law requires the prosecution to establish beyond a reasonable doubt and by legal evidence his guilt, and all the elements of his guilt. If the Government fails to so [1566] prove beyond a reasonable doubt all the elements, as I shall define them to you, you must find the accused not guilty.

You must not allow yourselves to be led to convict the accused in this case in order to satisfy a fear that some offense may go unavenged or unpunished, or for the purpose of deterring others from the commission of any like offenses. No such specious argument or reason can be weighty enough to justify you in laying aside that just and humane rule of law which requires you to acquit the accused unless every fact necessary to establish his guilt is proved to you beyond a reasonable doubt and to a moral certainty.

The rule concerning circumstantial evidence does not permit you as jurors to indulge in speculation, surmise, conjecture or guesswork in order to supply any element of the offense alleged by the prosecuting witnesses in this case to have taken place, where

proof of such element does not appear beyond a reasonable doubt and to a moral certainty. Speculation, surmise, conjecture or guesswork can never be substituted in lieu of proof in order to justify a conviction of an accused person.

Suspicion is not evidence. Mere suspicion, however strong, is not sufficient to establish any fact whatsoever necessary to constitute the crime charged. Mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of evidence [1567] support the allegations of the indictment, nor is it sufficient that upon the doctrine of chance it is more probable that the accused is guilty than innocent to warrant a conviction. The accused must be proved to be guilty so clearly that there is no reasonable theory upon which he can be said to be innocent when all the evidence is considered together. Mere opportunity of the accused to commit the crime charged is insufficient to justify a verdict of guilty.

Each essential independent fact necessary to complete a chain or series of independent facts tending to establish a guilt should be established to the same degree of certainty as the main fact which these independent circumstances taken together tend to establish, that is, each essential independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty and beyond a reasonable doubt and to the entire satisfaction of the jury. The circumstances must all concur to show that the defendant committed the crimes and must all be inconsistent with any

other rational conclusion and must exclude to a moral certainty and to the entire satisfaction of the jury any other hypothesis but the single one of guilt.

Duly qualified experts may give their opinions on questions in controversy at this trial. To assist you in deciding such questions, you may consider the opinion with the reasons stated therefor, if any, by the expert who gives his opinion. [1568] You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion, if you find it to be unreasonable.

In every criminal case the proof must substantially conform to the material allegations of the indictment.

By the arrest of the defendant and the filing of the indictment, no presumption whatsoever arises to indicate that the defendant is guilty or that he had any connection or responsibility for the act charged against him. A defendant is presumed to be innocent at all stages of the proceedings, and that presumption goes to the jury room, until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. This rule as I have stated applies to every material element of the offense.

Reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall

afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs. Reasonable doubt is not a mere possible or imaginary doubt, or a bare conjecture, for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt, as the same has been defined to you. Without it being restated or repeated again, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt it is to be considered in connection with and as accompanying all of the instruction that are given to you.

In judging the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you might reach a contrary conclusion. Whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial and to the evidence which has been introduced. A witness is

presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence [1570] affecting his character for truth, honesty and integrity, or by his motives, or by contradictory evidence.

In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of the evidence or testimony of any witness, as may be dictated to you by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all the circumstances under which the witnesses testified, as I have heretofore delineated them to you, and in addition to that relation that he might bear to the Government or to the defendant, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other witnesses, or other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jurors should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses, but you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women. [1571]

The interest of a defendant in the result of the action does not deprive him of the benefit of his own testimony. The law makes him a competent witness in his own behalf, and his testimony is entitled to full and fair consideration by you, the same as that of any other witness, and is sufficient in itself, if it raises in your minds a reasonable doubt as to whether the crime charged was committed by such defendant to entitle him to an acquittal.

You cannot base a verdict of guilt upon extra-judicial oral admission, or statements of a defendant alone, unless there is other evidence independent of such extra-judicial oral admissions or statements which establishes the body of the crime with which defendant is charged, or what is known as the corpus delicti and if you do not believe after a consideration of all the evidence that the body of the crime or the corpus delicti is established by evidence other than such extra-judicial oral admissions or statements, then and in that event, you cannot consider such extra-judicial admissions or statements for any purpose.

The mere fact that a witness is connected with the Government of the United States in any capacity whatsoever does not mean that the testimony of such a witness is entitled to any greater weight or credence by reason of that fact alone. You will consider the testimony of any officer or employee of the United States Government the same as you would consider the testimony of such person if he were not so employed. [1572]

Coming now to the charges in this case. It must be kept in mind that this is not a civil suit to collect taxes in which you could decide the case by a mere preponderance of the evidence, but the charges here must be proved beyond a reasonable doubt and to a moral certainty.

As to the defendant Sam Ormont, I have entered an acquittal as to Counts 2, 3 and 4. Therefore the only count before you as to this defendant is Count 1, which is for the year 1944. As to any evidence pertaining to the years 1942 and 1943, you are not to consider the same as proof of the crime charged in Count 1, except that if you should find beyond a reasonable doubt that the acts charged against said defendant in Count 1 were done by him, then you may consider the evidence pertaining to 1942 and 1943 for the sole purpose of determining whether or not any such acts as you may find from the evidence were done in 1944, as charged in the indictment, were wilfully and intentionally done by the defendant Ormont.

The law under which these defendants were indicted in substance provides, as is applicable to this case, that any person who wilfully attempts in any manner to evade or defeat any tax shall be guilty of a crime. The pertinent portion of the statute provides as follows:

“Any person required under this chapter to account for, and pay over any tax imposed by this [1573] chapter, who wilfully fails to truthfully account for any and pay over such tax,

and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof," shall be punished in the manner provided by law.

You are not to be concerned with such punishment, as that is a matter which lies solely within the providence and is the responsibility of the judge, in the event of a conviction. Nor are you to be concerned with whether or not any tax which might be due will or will not be affected as the tax liability, if any, exists with appropriate civil remedies regardless of your verdict in this case.

The indictment charges in Count 1 that the defendant Sam Ormont violated the Internal Revenue laws by wilfully, knowingly, unlawfully and feloniously attempting to defeat and evade the payment of Federal income taxes owed by him for the calendar year 1944, by preparing and filing, and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, a false and fraudulent income and victory tax return, in which he wilfully and deliberately understated the amount of taxable income, and the amount of income tax due for that year, and by [1574] concealing and attempting to conceal from Federal officers, and the Collector of Internal Revenue, the true and correct income received by the defendant Ormont.

Moreover, the Government charges that while the defendant Ormont reported that his income for the year 1944 was \$12,174.57, and that the amount of tax due thereon was \$3626.58, the true sum which the defendant Ormont should have declared as to his income for income tax purposes for that year was \$36,982.52, on which a tax of \$18,143.12 should have been declared and paid.

In this connection, it is not necessary for the Government to prove the precise amount which it charges was the true income of the defendant, nor is it necessary to prove the precise amount of tax which was due on that income. It is sufficient if the Government proves that in addition to the income which the defendant himself reported on his income tax return, the defendant Ormont received as income substantially the sum alleged as taxable income during that year. In other words, the Government need not establish as to Count 1 that the precise sum of \$36,982.52 was the correct net taxable income of the defendant Ormont for that year. Of course in this respect, as well as in all others, the Government's proof must convince you beyond a reasonable doubt.

Also, as to Count 1, I want to call your attention to the fact that it refers to an income and victory tax return, [1575] and that since there was no victory tax payable for the year 1944, the words "victory tax" are surplusage, and may be disregarded by you.

The indictment charges in Count 2 that the defendant Phillip Himmelfarb violated the Internal

Revenue laws by wilfully, knowingly, unlawfully and feloniously attempting to defeat and evade the payment of Federal income taxes owed by him for the calendar year 1944, by preparing and filing, and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, a false and fraudulent income tax return, in which he wilfully and deliberately understated the amount of taxable income, and the amount of income tax due for that year, and by concealing and attempting to conceal from Federal officers, and the Collector of Internal Revenue, the true and correct income received by the defendant Himmelfarb.

Moreover, the Government charges that while the defendant Himmelfarb reported that his income for the year 1944, computed on the community property basis, was the sum of \$4111.74, and that the amount of tax due and owing thereon was the sum of \$656, the true sum which the defendant Himmelfarb should have declared as his income, computed on the community property basis, was \$17,752.65, on which a tax of \$5843.91 should have been declared and paid.

Again, as to this count, it is not necessary for the [1576] Government to establish that the true net income of the defendant was the precise sum which it alleges in the indictment, and it is enough for the purposes of this case if the Government establishes that the true taxable income of the defendant Himmelfarb for the year 1944 was substantially the sum alleged in the indictment in excess of that which he reported in his return.

Thus the charge against each of the defendants in the appropriate counts consists of two elements: first, whether the defendant Ormont as to Count 1, and the defendant Himmelfarb as to Count 2, did in fact do the things charged beyond a reasonable doubt, and if you find that they did in fact do the things as charged, then you must determine beyond a reasonable doubt and to a moral certainty whether or not those things were done wilfully as that term will be defined to you.

In the event that you find that either defendant as to the particular count failed to report his true income in the amount substantially as claimed by the Government for the calendar year 1944, then as matter of law the tax for the calendar year 1944 would have been substantially more than paid by such defendant for the calendar year 1944.

Wilfulness is an element, as I have indicted, in the offenses charged in each of the Counts 1 and 2, and it must be established by the same degree of proof as any other element of the offense. Under the statute involved in this proceeding, [1577] it is necessary, before you find either defendant guilty, as I have indicated, to find that he violated the law wilfully.

The word "wilfully" as used in the indictment and throughout these instructions simply means an intentional, conscious doing of the act prohibited, that is, intending the result which actually came to pass without ground for believing that it was lawful, or conduct marked by a careless disregard as to whether it is lawful or not, or deliberate unwilling-

ness to discover and obey the law. Or, to express it another way, it means an act done with a bad purpose or with an evil motive to accomplish what the statute prohibits, without regard to what the law provides. So that you must come to a conclusion with relation to the element of wilfulness beyond a reasonable doubt from all of the facts disclosed by the evidence, taking into consideration the conduct of the particular defendant with relation to the matter charged against him, and every circumstance which bears upon that issue of wilfulness, and when you have considered all of the acts of each defendant with relation to the matter charged against him, the object to be obtained, the things that were done, the circumstances under which they moved, the motives that prompted the various persons in so far as disclosed from the evidence, and whether the particular defendant acted in good faith or not—from all of these you will determine whether or not any act charged in the indictment, if you found that it was done beyond a reasonable doubt and to a moral certainty by the particular defendant, was done by that defendant wilfully.

Every person may use all lawful means to avoid the payment of income taxes, and that the avoidance of income taxes by any lawful means does not constitute a criminal offense. It is an offense, however, to wilfully evade or attempt to evade the payment of such taxes.

The defendants in this case are not charged with concealing or attempting to conceal the gross or net incomes received by them, or the sources thereof,

but with wilfully attempting to defeat and evade income tax. Therefore, if you find from the evidence that the defendants did not attempt to evade the income tax due or owing by them, you must find the defendants not guilty, irrespective of whether the defendants did or did not conceal or attempt to conceal the true and correct gross or net incomes received by them.

If you find from the evidence that the defendants, or either of them, may be guilty of any other crime or wrongdoing not connected with the offense of wilfully, knowingly, unlawfully and feloniously attempting to defeat and evade a large part of the of the income tax due and owing by said defendant, or either of them, to the United States of America for the years set forth in the indictment, then and in that event you [1579] cannot and must not take into consideration any different or other offense or offenses that the said defendant might have committed, except as to the element of wilfulness with relation to the charge in this case only. You must find the defendants not guilty unless you believe from the evidence beyond a reasonable doubt that the defendant Sam Ormont as to Count 1, and the defendant Himmelfarb as to Count 2, did wilfully, knowingly, unlawfully and feloniously attempt to defeat and a evade a large part of the income tax due and owing by the said defendants as charged for the year 1944.

A joint venture or partnership return is merely an information return, and no income tax is due or payable in connection therewith. A partnership or

joint venture return is required to be filed for the purpose of disclosing the distribution of the income from such joint venture or partnership between or among the joint venturers or partners and where such return is filed on a fiscal year basis, the net income distributable to each joint venturer or partner must be reported by him and the tax thereon paid on or before the 15th day of March of the calendar year following the calendar year in which such fiscal year ends.

Under the Internal Revenue law, a joint venture or partnership may adopt what is known as a fiscal year, consisting of any period not exceeding 12 months, other than the calendar year, for calculating, reporting and paying income tax, [1580] and in the event of the election of a fiscal year which does not coincide with the calendar year, the persons comprising such joint venture or partnership are not required to pay a tax upon the income from such joint venture or partnership until the 15th day of March of the calendar year following the calendar year in which such fiscal year ends. [1581]

There has been placed in evidence the income tax return for the fiscal year May 1944 to April 1945, which was filed by the defendants on May 24, 1945. In this connection, it is part of your functions to decide whether the defendants actually had some income-producing enterprise, or enterprises, from which they derived the sum of roughly \$71,000, which they reported on that fiscal year basis in that return. In this connection, you must determine what enterprise, if any, the defendants

engaged in besides the operation known as the Acme Meat Company, if you decide they were engaged together in the Acme Meat Company, and whether the \$71,000 reported on that return was actually received by them as part of the transactions carried on as the Acme Meat Company, or whether the money was received as income with reference to some other transaction not part of the Acme Meat Company sales and operations.

Ultimately you are to decide in this connection, among other things, whether the \$71,000 odd dollars reported on the fiscal year return was or was not part of the income derived from the sales made as part of the operations of the Acme Meat Company, and whether that money, or a substantial part of that money, was in fact received by each of the defendants as part of his income from the Acme Meat Company operations; and if not, then whether or not books and records were kept of such other enterprise as required by the statute.

The statute in that connection, Section 41 of the Internal Revenue Code, reads as follows:

“The net income shall be computed upon the basis of the taxpayer’s annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in

accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

Books need not be formal.

The Internal Revenue regulations, which have the force of law, provide that the type of books and records which must be kept in this connection to allow the filing of a return on a fiscal year basis, are books and records which contain entries which are sufficient to establish the amount of gross income and the deductions, credits and other matters required to be shown in returns, and that such books and records shall be [1583] kept at all times available for inspection by Internal Revenue officers and shall be retained so long as the contents may become material in the administration of any internal revenue law.

If no books or records of the type required by law are kept, a fiscal year return cannot be filed, but the sums earned must be reported upon the calendar year return for the year in which they were earned.

The defendants in this case are charged with alleged violations of subparagraph (b) of Section 145 of the Internal Revenue Code; and said section does not make it a crime for the defendant taxpayer to conceal or fail to disclose the source or sources of income.

In order for you to find that sums received by the defendants during the taxable year 1944 constituted income to them, it is not necessary for the Government to prove the exact source of that income.

A taxpayer who is on a cash basis need not report any income on his return that may be due him until he actually receives the said cash income.

If you believe from the evidence in this case that any witness in the case was influenced or induced to become such a witness and to testify in this case by any hope held out that he would not be prosecuted for any reason for offenses committed, then the jury should take such facts into consideration [1584] in determining the weight and credit which should be given to the testimony of a witness thus obtained.

United States Government bonds bearing two different persons' names as co-owners are presumed by law to be equally owned by each person whose name is inscribed thereon, and that such bonds as are in the name of one individual are presumed by law to be owned by the person whose name is inscribed thereon.

Gifts do not constitute income and no income tax is due or payable on gifts. If the defendant believed that any moneys that he may have received from any sources whatsoever were gifts, such gifts, in whatever amounts they may have been, could not properly be included as taxable income in any income tax return required to have been filed by the defendant. And if you find from

the evidence that the defendant believed that such moneys were gifts rather than income, he must be found not guilty of any of the charges set forth in the indictment.

A gift is commonly defined as a voluntary transfer of property by one to another, without any consideration or compensation therefor. The term is also used to designate that which is given; anything given or bestowed; any piece of property which is voluntarily transferred by one person to another without compensation or consideration. A gift is a gratuity, an act of generosity, and not only does not require [1585] a consideration, but there can be none; if there is a consideration for the transaction it is not a gift. A gift is dependent upon no agreement, but on the voluntary act of the donor only.

There was some evidence concerning the filing of estimates. In that connection, the law relative to the declaration of an estimated tax is that a taxpayer may use as a guide the amount reported or paid by the taxpayer in the previous year to determine what his income tax should be for the following year. For example, if in the year 1943 a taxpayer has a net income of \$10,000 upon which he pays an income tax of \$1,000, the taxpayer may file a declaration of estimated tax for the year 1944 based exactly on the income tax earnings of the year 1943, irrespective of any larger or greater amount that he may actually earn in the year 1944.

If you find from the evidence that the defendant Sam Ormont did not wilfully and knowingly at-

tempt to defeat and evade a substantial part of the income tax due and owing by him for the calendar year 1944, as alleged in count 1 of the indictment, or if you are unable to determine from the evidence whether or not the defendant Sam Ormont did or did not wilfully and knowingly attempt to defeat and evade a substantial part of the income tax due and owing by him for the calendar year 1944, as alleged in count 1 of the indictment, or if there is a reasonable doubt in your mind as to whether or [1586] not the defendant Sam Ormont did or did not wilfully and knowingly attempt to defeat and evade a substantial part of the income tax due or owing by him for the calendar year 1944, as alleged in count 1 of the indictment, then in either of those events the defendant Sam Ormont is entitled to a verdict of not guilty at your hands.

If you find beyond a reasonable doubt that the defendant Ormont, as charged in count 1, did wilfully and intentionally attempt to defeat and evade the payment of taxes due to the United States of America by filing a false and fraudulent return for the year 1944, in which he failed to disclose the true and correct amount of income which he had received during that year, then the government is entitled to a verdict of guilty as to Sam Ormont as to count 1.

If you find from the evidence that the defendant Phillip Himmelfarb did not wilfully and knowingly attempt to defeat and evade any part of the income tax due and owing by him for the calendar year 1944, as alleged in count 2, or if you are un-

able to determine from the evidence whether or not the defendant Phillip Himmelfarb did or did not wilfully and knowingly attempt to defeat and evade any substantial part of the income tax due and owing by him for the calendar year 1944, as alleged in count 2, or if there is a reasonable doubt in your mind as to whether or not the defendant Philip Himmelfarb did or did not knowingly and wilfully attempt to defeat [1587] and evade any substantial part of the income tax due or owing by him for the calendar year 1944, as alleged in count 2, then the defendant Himmelfarb, in the event of either of those contingencies is entitled to a verdict of not guilty at your hands.

If you find, on the other hand, that the defendant Himmelfarb, as charged in count 2, wilfully and intentionally attempted to defeat and evade the payment of taxes due to the United States of America by filing a false and fraudulent return for the year 1944, in which he failed to disclose the true and correct amount of income which he had received during that year, then the government is entitled to a verdict of guilty as to the defendant Himmelfarb.

Evidence of a defendant's good character is in the same category as other factual evidence and must be considered by you in your deliberations and may of itself, if believed by you, create a reasonable doubt where otherwise no reasonable doubt would exist.

It is the constitutional right of a defendant in a criminal case that he may not be compelled to

testify. The failure of a defendant to testify cannot create any presumption against him or warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt and to a moral certainty. [1588]

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the government to prove every essential element of the charge against him, and no lack of testimony on the defendant's part will supply a failure of proof by the government so as to support by itself a finding against him on any such essential element.

In the trial of this case there were many instances—many of them—where certain evidence was admitted as against one of the defendants but denied admission as against the other defendant. Now it is and may be difficult for you in considering the case for or against one of the defendants to disregard completely any evidence that was admitted only as to another, but that is your plain duty with respect to evidence not admitted by the Court as against a certain defendant, and you must try conscientiously to so treat the situation.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question which depends upon evidence presented to them. You are expected to use your good sense, to consider the evidence for the purpose only

for which it was admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no doubt remains the Government is entitled to the verdict, for to the jury, to you, belongs exclusively the duty of determining the facts.

If the judge has said or done anything which has suggested to you that he is inclined to favor the claims or position of either the Government or the defendant in this case, you will not suffer yourself to be influenced by that suggestion. He has not expressed or intended to express, or intimated or intended to intimate, any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, what inferences should be drawn from the evidence adduced or not, and if any expression of the judge has seemed to indicate to you any opinion relating to any of these matters you are instructed to disregard it.

You should not consider as evidence any statement of [1590] counsel made during the trial unless such statement was made as an admission or a stipulation conceding the existence of a fact or facts. You must not consider for any purpose any evidence offered or rejected or which has been stricken. You are to decide this case solely upon the evidence that has been admitted by the Court and the inferences that you may reasonably draw

therefrom and such presumptions as the law may deduce therefrom as heretofore directed in these instructions.

It is your duty as jurors to consult one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment in the case. To each of you I would say that you must decide the case for yourself, but should do so only after a consideration of the case with your fellow-jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you should vote either way, nor be influenced in so voting, for the single reason that a majority of the jurors are in favor of such a vote. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict, or solely because of the opinion of other jurors.

Remember that you are not partisans or advocates in this matter, now you are judges. The final test of the quality of [1591] your service will lie in the verdict which you return to this courtroom, not in the opinions which any of you may have when you leave this room. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end the Court would remind you, in conclusion, that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

After the bailiffs have been sworn you will go

to lunch, return to the jury room, select one of your members as foreman, and when you have reached an agreement you will return to the jury box. If you desire any of the evidence and will advise the bailiffs, they will secure it and take it to the jury room with you.

The Clerk will swear the bailiffs.

(At this point the bailiffs were duly sworn by the Clerk.)

The Court: Here is a blank form of verdict. When you have arrived at a verdict you will fill it out and the person whom you have selected as your foreman will fold the verdict after signing it, return to the courtroom and hand it to the bailiff.

All of the jurors will retire except Juror No. 13.

(The jury retired from the courtroom at 12:50 o'clock p.m.) [1592]

The Court: Mrs. Tuttle, you may be excused for the remainder of the term.

Rather than to file the instructions which I have here—I take it the instructions will be written up by the reporter?

Mr. Kosdon: Yes, your Honor.

The Court: Is it agreeable that the Clerk's copy of the transcript of my instructions will be the Court's instructions as filed?

Mr. Robnett: We will so stipulate.

Mr. Strong: So stipulated.

Mr. Katz: So stipulated.

The Court: Very well. We will recess.

(Short recess.)

Los Angeles, California, June 13, 1947

3:20 o'clock p.m.

The Court: Mr. Bailiff?

The Bailiff: The jury has reached a verdict, your Honor.

The Court: Call the jury down.

(The jury returned to the courtroom at 3:20 o'clock.)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: We have.

The Court: The foreman will hand the verdict to the bailiff, please.

The Clerk will read the verdict.

The Clerk: "In the District Court of the United States, Southern District of California, Central Division; United States of America, Plaintiff, v. Sam Ormont and Phillip Himmelfarb, Defendants; No. 19138, Criminal.

VERDICT

"We, the jury in the above-entitled cause find the defendant Sam Ormont guilty as charged in Count 1 of the indictment, and

"We, the jury in the above-entitled cause find the defendant Phillip Himmelfarb guilty as charged in Count 2 of the indictment.

"Guy F. Campbell, Foreman of the Jury.

"Dated: Los Angeles, California; June 13, 1947."

The Court: The Clerk will poll the jury. [1594]

(Whereupon the Clerk polled the jury individually, each juror answering in the affirmative that it was his or her verdict.)

The Court: Very well, ladies and gentlemen. Thank you for your time. You will be excused until you are notified.

As to the matter of sentence, are you ready for sentence at this time?

Mr. Katz: If the Court please, we would like to have the matter go over for the purpose of making a motion for a new trial.

The Court: On behalf of both defendants?

Mr. Robnett: Yes, your Honor.

The Court: You now give notice of motion for a new trial?

Mr. Katz: Yes.

The Court: And motion for judgment non obstante veredicto?

Mr. Robnett: Yes, at this time.

The Court: Very well. I will set the motions for hearing Monday morning at 10:00 o'clock, and continue the matter of sentence and all further proceedings to that time.

Are the defendants at liberty on bail?

Mr. Strong: I think so, your Honor.

Mr. Robnett: They are not in this case, your Honor, but I was going to ask, Mr. Ormont has been on his own recognizance [1595] in this case all the time.

Mr. Strong: I think the bail is in the other case.

Mr. Robnett: Yes, it is in the other case. So we ask that he be so admitted now to bail. He is a substantial citizen and, as counsel says, he is under bond in the other case anyhow.

The Court: Mr. Katz?

Mr. Katz: The same situation is true with respect to Phillip Himmelfarb.

The Court: Very well. The defendants will be released on their own recognizance and are ordered and directed to return to this courtroom at 10:00 o'clock Monday morning for sentence and all further proceedings.

The court will stand adjourned.

(Whereupon, at 3:30 o'clock p.m., the court was adjourned.)

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of June, A.D., 1947.

/s/ AGNAR WAHLBERG
Official Reporter.

Los Angeles, California, June 16, 1947

10:00 o'Clock a.m.

(Other court matters.)

The Court: United States v. Ormont and Himelfarb. The matter is on this morning for a motion for judgment non obstante veredicto, notice of which was given orally Friday, and a motion for a new trial.

Mr. Katz: Yes, your Honor.

The Court: Have you prepared a written motion for a new trial?

Mr. Katz: I have, your Honor. I have prepared a motion in the alternative for acquittal and new trial.

The Court: Very well. I do not wish to restrict you in your argument, but the case having concluded just last week I think that perhaps the evidence is still fresh enough in my mind.

Mr. Katz: I am going to assume that, if the Court please, in the argument and I propose and intend therefore to restrict the argument.

However, in connection with the matter of the motion for a judgment of acquittal notwithstanding the verdict of the jury, your Honor will recall that at the motion made at the conclusion of all the evidence I delineated the evidence that was before the Court as against the defendant Himelfarb because I felt at that time the Court should particularly [1599] resolve any doubt that it may have in favor of the defendant because of the fact that evidence came into this case against two differ-

ent defendants, some of which and most of which did not come in as against the defendant Himmelfarb, that I believed and felt that the jury could not and would not be able to segregate the evidence and render a judgment upon the evidence in as against each defendant.

Now, if the Court please, we since have had the argument of counsel in this case as well as the instructions, and I wish to direct your Honor's attention particularly to the argument of counsel, and looking first, if the Court please, to the argument Mr. Strong made in opening, reading from page 1453, the statement was made to the jury:

“You know what was going on with the sale of meat. You know what those payments are. I am not even going to mention them by name. It would be insulting your intelligence to mention them—these extra, unreported side payments, that he took with the left hand, the amount of money, and put it in the left pocket, and then he puts in the Acme books, and takes the extra money with the right hand, and puts it in the right-hand pocket. Simultaneously, on the same sale of meats, he has engaged in two separate enterprises, one selling at the price shown on the invoices, and the other getting this unreported [1600] additional amount, this extra money, this side money, which was split fifty-fifty, and the legitimate part being split on the basis Mr. Bircher and Mr. Phoebe told you.”

With respect to that portion of the argument which I just read to your Honor, it was based upon testimony that was not in the case as against the defendant Himmelfarb. As a matter of fact, the argument was not made as against the defendant Himmelfarb. My client, Mr. Himmelfarb, was only convicted on the basis of those statements and that evidence that was not in against him.

Proceeding further from the point just left off at page 1454 there is the additional statement. And here we have a change, if the Court please, although the argument is an argument with respect to Count 1 as against the defendant Ormont, not against the defendant Himmelfarb, and we have a change in pronouns from the "he" to the "they." It commences:

"And they take this money, and they put it away, Mr. Ormont particularly, and on the 24th day of May, 1945, when he is caught, he rushes in and files a return."

We there have the shift back again to the individual. Here again we have a reference to matters as against a defendant of testimony that is not in the record as against the defendant Himmelfarb, arguments made to a jury with respect to a [1601] particular defendant that could not have been and should not have been made as against the defendant Himmelfarb.

Proceeding further on page 1454, and getting down to the bottom of that page, we have the statement:

“I ask you, ladies and gentlemen, if that kind of testimony will tell, whether that kind of evidence will convince you that their income tax was reported properly, or if it was on a fiscal year basis? Money that comes in as extra payment, money collected, which the right hand keeps from the left hand, money, after the investigation starts in, reported as miscellaneous enterprises, miscellaneous income; no expense, \$70,000, split, in two years—do you think that is a bona fide business venture, on a fiscal year basis, when he rushed in, on May 24th?”

There again we have a reference, if the Court please, and a repetition of references to a matter of side payments, and I am satisfied, your Honor, after a consideration of the evidence that came into this case as to the defendant Himmelfarb and the argument that Mr. Strong made, both in opening and closing, that the defendant Himmelfarb was not convicted of evading income tax, he was convicted on a matter of testimony that came in, not against him at all but against a co-defendant, of side payments and not on the basis of the charge before this Court in this case. [1602]

We turn the page, if your Honor please, to page 1456, and this is all still matter of argument as to testimony that came in as against Ormont and

presumably, supposedly, an argument as against that defendant on Count 1 and not as against the defendant Himmelfarb on Count 2.

Starting at page 1456:

“You will know about how much money they earned in 1944. That money they did not report, although they knew they earned it in 1944; knew it was part of the operation of the Acme Meat Company; and knew it was side money, in connection with the sale of meat. They did not report it.”

There again, if the Court please, we have matters, references to matters, that were not before the Court and jury, no testimony with respect to the matters that I have alluded to as against the defendant Himmelfarb, yet an argument made, and the use of the “they” in the argument as to Ormont on Count 1 which could not help but prove prejudicial to the rights of the defendant Himmelfarb, and particularly when we consider the evidence that was in in the case against him.

I call these to your Honor’s attention because I believe that your Honor should take a realistic approach to the matter of this case and know just exactly what the position was of the defendant Himmelfarb before this Court and jury in so far as the evidence that was in against him, and viewed in the [1603] light of the entire case and the argument that was made.

Now on page 1457, starting with line 2—I will start with the bottom of page 1456, line 25:

“They don’t report on how or where the money came from, but that same day, after it was filed—they filed it in the morning; Mr. Ormont went up to see Mr. Bircher and Mr. Phoebus, and had a long discussion. You remember the record. He told them where the money was from. You remember he tried to get out of saying it was extra payments; side money. He made it sound like gifts.”

There again we had a matter, in so far as the defendant Himmelfarb is concerned, which is absolutely and completely dehors the record, and it is a matter both with respect to testimony referring to the co-defendant, with respect to the argument which presumably refers to the co-defendant, but here again we have a situation where the testimony and the argument presumably is against someone else. But I don’t believe there is any question that it is on the basis of that argument and that testimony, which did not come in the record as against the defendant Himmelfarb, upon which he was convicted.

Referring again, if the Court please, to page 1459, and commencing at line 13:

“Do you think that in a business which produced an income that was reported of \$12,000 for the year [1604] 1944, do you think that the customers of that business brought in \$70,-

000 in gifts? That is a new term for those side payments, gifts, voluntary gifts. You don't have to pay it, but what do you get if you don't? You know what those payments were."

The repetition, if the Court please, is quite consistent throughout the argument in the case.

Now if I may turn to the closing argument, in Volume XIII, and especially page 1541, commencing at line 15, Mr. Strong states in closing argument:

"Now as I said to you at the outset, this is a simple case. It involves meat, the sale of meat by the Acme Meat Company, and in connection with that sale of meat they collected money which was shown on the invoices and reported on the books. You heard that testimony.

"Besides that, on the other hand, they collected some more money. They like to call it gifts, they like to call it something else. But you know what it is, it is overcharges, extra money on the side. Did they collect that as a special or separate venture?"

And here, if the Court please, we finally get around to a situation where Mr. Strong apparently convinces himself that this is not a case of evading income tax, and he goes on to [1605] say that it is a case involving meat and the sale of meat and discusses the matter of overcharges with respect thereto. And here again it is matters where as to the defendant Himmelfarb it is a matter of

testimony that is not in the record against him, and the argument I believe was one that was intermingled so that you 'couldn't always tell whether it was Count 1 or Count 2 that was being argued. At any rate, the use of the "they" would quite obviously make it applicable to both of the defendants.

Again at page 1543:

"They explained why they didn't report themselves as partners, because it might embarrass them with some other Government agencies. And they explained to you why they would rather call these separate payments gifts, because it might embarrass them with some other Government agencies. Well, you know what they are doing here. They are selling meat, getting money with the right hand and the left hand, and they are reporting the money that they get with the right hand. It is as simple as all that."

Here again, if the Court please, we have a constant repetition of matters of a highly prejudicial nature, matters which are not in the record as against the defendant Himmelfarb, and the use of terms making it applicable to both of the defendants. [1606]

In connection with those matters, if the Court please, I do not believe that it can be said the rules of evidence or constitutional guarantees mean anything if, on the basis of the kind of record that your Honor had before you in this case with respect to

the defendant Himmelfarb, that type of argument and those types of statements can be made and used as a basis of a conviction.

In the motion for acquittal made at the close of all the testimony I tried to call that to your Honor's attention because I anticipated the prejudicial nature of the testimony against one defendant could not be segregated or departmentalized by the jurors in their mind so that it would not affect, as it should not affect, the other defendant.

Now on page 1558, if your Honor please, we get into an entirely different phase of the argument.

Starting at line 11 Mr. Strong makes the statement:

"Then Mr. Katz tells you, look at these records. One was prepared by Mr. Moody, he is an accountant; and the other is prepared by Mr. Malin. So what? Where is Mr. Moody? He is the accountant for the defendant and he has something to say in the defense of the defendant, why didn't the defendant put him on the stand to testify? Why didn't they put Mr. Malin on to testify as to what he knows about that? I had him on the stand for a limited purpose, as [1607] much as I could get. Did they call him back? Was there something with reference to the preparation of that return which corroborates the defendant Himmelfarb? Why didn't they put Mr. Malin on the stand to tell you about it then? He is just as accessible to them as he is to me. And if it is their defense, it is their witness. They didn't put Mr. Moody on, they didn't put Mr. Malin on."

Now your Honor will recall that with reference to the witness Malin he was not permitted to testify because of matters pertaining to privilege, which is a constitutional right of the defendant to avail himself of.

With reference to the matter of Mr. Moody, the only reference was that the exhibit indicated on its face that it was prepared by a Mr. Moody, and that was called to the attention of the jury. There was nothing to indicate as to whether he was more accessible to one party than he was to the other, or accessible or inaccessible, but nevertheless the fact remains with respect to both witnesses the burden is not upon the defendant to prove his innocence, the burden was upon the prosecution to prove the guilt of the defendant. Consequently it was improper and prejudicial to call the jury's attention to certain witnesses who might have been called or who weren't called or could have been called for the purpose of establishing the defense or innocence of the defendants. [1608]

Counsel knew, and well knows, that that was the burden of the prosecution, and it was highly prejudicial to make an argument to them on the basis that it was the burden or the duty of the defendant to establish his innocence rather than the burden of the prosecution to establish his guilt.

If the Court please, I believe that these matters that I have called your attention to are serious matters.

The Court: I think your objection should have been made at the time of the argument on the first segment of facts that you are talking about when

he used "they" instead of "he." I do not believe that there could be said to be any prejudicial error there in any event because it was the contention of the Government that all of the money was earned by them as partners in the Acme Meat Company. It was suggested in cross-examination, it was suggested not only by the Exhibit 6 which was filed, the joint venture return, but repeatedly throughout the trial that it was a joint venture, something separate and apart from the Acme Meat Company. So I think that his use of the word "they" for "he" was not prejudicial.

On this latter point that you called my attention to, I think that one who is harmed by an argument cannot sit by and take his chances of acquittal and then raise it as an objection. He cannot sit silently by. I think you should have raised that point during the course of the argument. I am not sure that it is error anyhow, but had you raised it I [1609] would have instructed the jury again, as I did with regard to Mr. Malin, that he could not be compelled to testify except on matters which I permitted him to, and that was made very clear I think to the jury in the course of the testimony.

Mr. Katz: If the Court please, with reference to the matter of the statements respecting the joint venture, there again, if the Court please, the matter of Exhibit 6 was before the Court and jury with respect to the defendant Himmelfarb but the matter of the source of that income or the type and kind of income that it represented was not before either the Court or jury as against the defendant Himmelfarb.

The Court: Yes, it was. Exclusive of the testimony relating to statements by the defendant Ormont. In the first place, it was before the jury in the statement which was made by the defendant Phillip Himmelfarb in his affidavit and his letter, and in the second place it was before the jury by the testimony of at least one witness, if not more, that Phillip Himmelfarb was working at the Acme Meat Company plant during this period of time, selling customers, fixing up meat, and so forth, from which they could infer that the income derived was in that manner.

And also the witness Gorgerty, the testimony of their admission, Mr. Himmelfarb's statement to him that it was a partnership, that was also in.

Mr. Katz: At some point in that chain of reasoning it [1610] is, however, necessary to reach over into and over on the side of the testimony that came in as against the other defendant only in order to complete it, and without that it wouldn't be there. While it is true that the affidavit sets forth the income and over what period, there is nothing to indicate from what source that income was. Mr. Gorgerty's testimony did not indicate that.

The Court: That is on the return, miscellaneous enterprise. If nothing else, from the street address given on the return, which was the address of the Acme Meat Company.

Mr. Katz: It may be that some inference could have been drawn there, but there might have been any number of operations from the same place.

The Court: Well, it wouldn't be likely. I think it is a fair inference, if one testifies that he sees a person working down at the Acme Meat Company, and another thing too, the testimony of the witness Bircher and the testimony of the witness Phoebus, that Himmelfarb was there. Now I did not permit any testimony to go in as to what Himmelfarb said on the occasion of May 23rd, or whatever date it was, that they were down there, but that was permitted to remain in the record, that the witness Bircher and the witness Phoebus saw Himmelfarb at the plant, that he was in the office, that he did write something on some affidavit and that the ensuing incident occurred. He was present. [1611]

So I think that there is sufficient evidence in the record, counsel, that a jury of reasonable men and women would be justified in drawing that conclusion, and I think it is sufficient that I would not be justified in substituting my judgment for their judgment.

Mr. Katz: With respect to the latter statement, in the matter of argument that your Honor said that should have been the subject of objection, there again it is my thought that the realistic approach requires that we view the situation as it then exists. Here we have highly prejudicial statements that are made during the course of an argument, and if an objection had been made to those undoubtedly any ruling that would have followed would have been an instruction to to the jury, following repeated instructions, not to consider that except as against the one defendant, and to have made an ob-

jection at that point would have merely increased the extent of the prejudice. I mean, those things tend to prejudice juries rather than to result in effectuating or saving the record.

The Court: I don't know, counsel. I used to be firmly of that conviction when I was practicing law, but sitting on the bench and watching jurors from this side of the bench I think sometimes they are pretty careful and usually are in disregarding things that should be given no weight in their testimony. Then of course there is the other school of thought that it prejudices the prosecutor when he makes statements [1612] that he shouldn't, prejudices of the prosecution of the case and operates to the advantage of the defendant.

I think that so far as your first category of facts, the use of the word "they," that no prejudice could have resulted; and as to the other one—and I am not deciding that it was prejudicial but that if it was prejudicial I think you should have made an objection at the time and an appropriate instruction given to the jury concerning the testimony of the witness Malin, and the same situation as to the witness Moody.

For that reason the motion for a judgment non obstante veredicto is denied, as is also the motion for a new trial for the defendant Himmelfarb.

Mr. Robnett?

Mr. Robnett: Yes, your Honor.

The Court: By the way, while I think of it I want to take this occasion to compliment the lawyers on both sides in this case.

Mr. Robnett: Thank you very much.

The Court: This has been one of the most pleasant cases to try from the judge's point of view, due to the lack of bickering, that I have had the pleasure, and especially having just finished 13 weeks of the most difficult case upon my patience, so this one came as a sort of calm.

Mr. Robnett: I was just going to preface my remarks by saying that I believe in the history of my experience I have [1613] never had a more pleasant judge to try a case before than your Honor, and a more fair one. I do want to thank you very much.

I have not filed a written motion for acquittal notwithstanding the verdict, your Honor, because it would take so much time and would try your patience. I wanted to make it orally if I might and embrace in that motion all the grounds I embraced in my motion to dismiss the indictment in the first instance, the grounds I embraced in my motion for a bill of particulars, and the grounds that I embraced in my motion for an acquittal on this count at the end of the plaintiff's case, and again at the end of all the evidence and before the matter was submitted to the jury.

The Court: Your motion for judgment non obstante veredicto and motion for new trial will be deemed to have been made as if in writing on all of those grounds.

Mr. Robnett: Thank you.

The Court: And if there is anything else I can say to protect the record here so that when you get to the Circuit Court they will not say you did not, tell me what to do and I will say it.

Mr. Robnett: Thank you, your Honor. That is broad enough.

I wanted to add to that—perhaps it isn't exactly an addition; I think it was in my last motion, but if not I would [1614] add it at this time—what I deem to be an error in not striking the evidence of Mr. Eustice as to the years 1942 and 1943. That was very voluminous evidence, most all of his testimony, in other words, was addressed to those years. There was some of course addressed to 1944 but the cross-examination was particularly gone into on those years for a long period of time, as you will recall, and I believe it was really prejudicial that that evidence should be left in even with the instruction that your Honor gave to the jury that it was in there only for the limited purpose of considering the wilfulness or lack of wilfulness.

The Court: May I interrupt you?

Mr. Robnett: Yes, your Honor.

The Court: I thought that it benefitted the defendants, leaving it in, as much as it did the Government, by virtue of your cross-examination of the defendant Eustice.

Mr. Robnett: Apparently it doesn't, though, your Honor. At least we haven't yet realized the benefit.

The Court: As long as it went solely to the question of wilfulness of the defendants, it seemed to me that his testimony was pretty evenly balanced.

Mr. Robnett: Well, I am fearful that the jury were of this impression, that they were considering all of that testimony and all of the time it took

here and figured that there must be a verdict of guilty in the case based upon such a long [1615] trial and so much evidence, and that they could not have disabused their minds of that particular evidence even under an instruction that your Honor gave them that they could only use it for the purpose of wilfulness. I don't think it showed any wilfulness at all. I think, if your Honor please, that it should have shown lack of wilfulness instead of wilfulness, having acquitted the defendant Ormont on those counts.

I make that further motion at this time, or ground, and in addition thereto I wish again to call your Honor's attention to the Treasury Department's rule or policy that I cited at one time or mentioned, that where a defendant in a case of this character comes forward and gives up all the facts and evidence, makes a clean breast, as it were, out of that criminal prosecution will not follow. It is not their policy.

In the case of Lustig, in 72 F. Supp.—I believe at page 306—there a motion was made before the Court to enforce that rule. The Court didn't do it, but went into the rule very thoroughly and held that there wasn't sufficient groundwork for that.

The Court: I think that might be a basis for excluding the statement. I do not think it can be a basis for suppressing the prosecution or for granting a motion for a new trial, because under the statute the Treasury Department have the power to compromise a criminal case. It is the only de-

partment of the Government having that power not to prosecute, except [1616] the Department of Justice.

But that is not done until it is compromised, until the compromise is effectuated. Other than that, there is no person, none, from the President on down, who has the power to decide under the statutes and laws—and this is still, I hope, a government of law—whether a person shall or shall not be prosecuted except the appropriate officials in the Department of Justice. Neither has the Secretary of the Treasury any power to make such a statement, and having no power to make such a statement and making it, and somebody is induced to give a statement on that basis, it might be ground for excluding the statement.

Mr. Robnett: Might it not also be a ground for consideration of your Honor in passing judgment where, as in this case, the defendant Ormont, as you remember the evidence as well or better than I do, from the very beginning gave every fact that they asked him for, supplied everything that they finally put in, and without which, without his books and without those statements and without the affidavit that he made here and the letter he wrote them at their behest, without those things I do not believe the Government could have even established a *prima facie* case here.

You will recall that most everything was given and given freely. Now he gave them because we must assume that rule or policy had been so well publicized that a man would say to [1617] himself,

“Well, I will give them everything here,” and he did do it. He didn’t act like a man that was trying to evade anything as to income tax.

I wish to call your Honor’s attention to that situation in any event because I think your Honor will take into consideration in whatever ruling you make here all of the matters, but there were so many matters you might overlook something, and that particular thing I think is of very great importance to Mr. Ormont. They couldn’t have gotten his books without his consent on a criminal investigation, they couldn’t have had any record from him at all without his consent, they could not have had any statement from him without he voluntarily gave it to them, and they couldn’t have had the affidavit.

The Court: Have you read the Harris case?

Mr. Robnett: No, I haven’t, your Honor, but I believe that statement I have made, that he could have protected himself on a criminal investigation on his constitutional rights, that they could not have forced him to give evidence against himself. That is the reason I cite those matters to your Honor.

But in any event they are matters that I thought really showed that the man had no wilfulness to evade income tax. He had a wilfulness not to let some other department know something about what he was doing, but that I don’t think is [1618] the wilfulness that is intended in the evasion of an income tax. I don’t believe the fact that you are willing to do something over here can be used as a wilfulness to do this act. And that was what I had in mind, and I hope your Honor will give those matters consideration on my motions.

That is about the only grounds I have.

The Court: Very well. Do you wish to be heard, Mr. Strong?

Mr. Strong: No, your Honor.

The Court: Do you consent to the granting of the motion?

Mr. Strong: No, your Honor. I assume that your Honor thinks the motions should be denied.

The Court: Yes, I think so. They cover matters that I have given consideration to heretofore.

Are you ready for sentence?

Mr. Robnett: Yes.

The Court: This is a conviction under Section 145(b) of Title 26, is that not right?

Mr. Strong: Yes, your Honor.

The Court: Which provides that in addition to the other penalties provided by law the defendant shall be guilty of a felony and upon conviction thereof shall be fined not more than \$10,000 or imprisonment of not more than five years, or both, together with the costs of prosecution.

Well, I have no idea what the costs of prosecution are [1619] here.

Mr. Strong: We can figure those out, if your Honor deems that a part of the sentence.

Mr. Robnett: Couldn't you give us an estimate?

Mr. Strong: Not at this moment.

The Court: Do you wish to say something in connection with the sentence, Mr. Katz?

Mr. Katz: Yes, if the Court please. I do not believe it is necessary to call your Honor's attention to the fact that the taxes have been paid—that

was all gone into in the record of this case—that the amount of tax claimed to be due prior to the filing of the indictment was paid.

The Court: With penalties?

Mr. Katz: No, your Honor, it was not paid with penalties. Any penalties that may be due by reason of the filing for the subsequent year rather than the previous year, I presume that the Internal Revenue Department will take the proper steps to recover such penalties as may be due them.

With reference to the situation of this defendant now, he is convicted of a felony, he has that, if the Court please, to carry with him for the rest of his days. To what extent the Court believes that to be punishment, I don't know. I believe it could be punishment in and of itself of the severest type and kind.

Your Honor has before you in the way of an exhibit the [1620] net worth statement of this defendant. Your Honor can, based upon the case——

The Court: I think that this case indicates a prison sentence, counsel. I think there are many things to be said in condemnation of the practice of the Internal Revenue Agents in securing information and then building a case on it, and I tried to exclude, and I think I did exclude, all of the testimony upon which there was any basis for finding that they had not been properly warned. But I am familiar with the general warnings that are given by agents, investigating crimes. They do not emphasize, I might say, the fact that they are going to prosecute a fellow. But even so I think these two

defendants here wilfully intended to evade their income tax for the year 1944, so I do not think I am going to impose any fine. I think I will have to give these defendants a prison sentence.

Mr. Katz: That is all that I can say, if the Court please, in light of the entire case, the facts and circumstances as I see them. It is my humble opinion, if the Court please, that the fact that they stand convicted of a felony, together with a fine should more than be enough in the way of punishment.

The Court: That is a punishment. That is a very severe punishment to people who are not professional criminals, but I think what happened here is that maybe Ormont was getting [1621] along all right in his business until the defendant Himmelfarb came along with this idea of extra charges, and the temptation was a little too great for him to resist, with the scarcity of meat at that time, to make some extra money.

Mr. Katz: Your Honor is now assuming something that isn't before your Honor by way of record, which is speculation, surmise and conjecture.

The Court: No, it was side money, it was some kind of a business, according to their contentions, that didn't have anything to do with the price of meat.

Mr. Katz: No, I am referring, if the Court please, to your Honor's statement that one was getting along all right until the other came along. I think your Honor is assuming that the one party, Himmelfarb, has a greater degree or taint of guilt.

The Court: No, I do not say so. That may be, but according to all of the evidence in this case this additional charge, this additional sum of money, whether it be termed gifts or what it might be termed, didn't start until Himmelfarb and Ormont started to work together. I cannot believe that people went down in the course of a year and made voluntary payments.

Mr. Katz: I made no such contention in this case, your Honor, at no time, and I do not make it now. That has never been my position in this case.

The Court: That they were gifts?

Mr. Katz: No, your Honor. I have never been in that position.

The Court: No, your position was that it was a joint venture as to the overcharges.

Mr. Katz: My position was that this was a joint venture, yes, but in so far as this case is concerned I have taken the position that as against the defendant Himmelfarb there hasn't been any testimony in the record that came into the record against the defendant Ormont as to what they were, and that we weren't called upon and didn't undertake in the case to make any explanation. I want this Court to know that I haven't taken that position.

The Court: I am mentioning only the matter of the overcharges because it seems to me that phase of it to be conclusive as to their wilfulness on the income tax. They were getting this money from some place. It didn't go through the Acme Meat Company books.

Mr. Katz: The fact that it didn't, if the Court please, is not an indication, in my opinion, that it was for the purpose of evading income or concealing it. There may have been a purpose in concealing it from some agency or department, yes, and it was wilful on that aspect, but as to whether it was for the purpose of evading income tax, it is my opinion that that had nothing to do with it, and wilfulness in one direction [1623] cannot carry over into the other. I don't think that the actual facts would establish any such proposition.

It may be, if the Court please, that I might be engaged in gambling activities that I wouldn't want my books or records to reflect, and consequently would wilfully keep those records from disclosing that fact. On the other hand, assuming that I am an honest and upright citizen I would pay my tax upon such funds—I took a bad example when I took gambling, as your Honor will agree—speaking from the average experience of the average citizen I presume. But any funds from a source that may not reflect credit upon the individual receiving them, or which may result in difficulties with a particular department or agency, whether it be federal, state or local, if the Court please, might well not be reflected upon books and records and yet the tax due thereon be paid.

The Court: Yes, but it was not done here. It was not returned in that year. As I say, that is the indication to me, and to me that is the only phase in which I am taking that into consideration in this case, because these two defendants here are

charged in another case with violations in connection with the OPA. They are entitled to be acquitted or convicted on that charge and stand alone upon it. But in this case that is indicative of the fact that they wanted to conceal maybe ultimately whatever they were doing in so far as subsidies are concerned, but in doing that they were willing [1624] to take a chance in not disclosing it to the Internal Revenue Bureau.

In other words, the definition of wilfulness, as you will recall, includes a reckless disregard. So if they did not consciously intend the crime, the evidence shows they certainly had a reckless disregard as to whether or not it was returnable in the year 1944.

Mr. Katz: Now, if the Court please, with reference to the matter of the penalty to be imposed, I believe that the matter of rehabilitation is a primary matter that should be considered by this Court. It is my honest and sincere conviction and opinion that after the experience of these defendants, with the conviction of a felony and the penalty that would be imposed other than the matter of imprisonment, that there isn't even the remotest possibility that the defendant for whom I speak will ever engage in any type and kind of criminal activity at all. And I think that that is the purpose that should be sought to be accomplished by your Honor in this and every case, and not a mere matter of punishment for punishment's sake.

The Court: Certainly not punishment for punishment's sake.

Mr. Katz: Punishment hasn't been and isn't, in my humble opinion, a matter of deterrent to crime. I think we have had the classic example in this case of where just a little while [1625] ago this local woman, who having been punished and convicted and sentenced and served 18 years, if punishment had been a detriment under no circumstances would a person have committed the same crime, and yet she comes out and proceeds to do it over again. So if punishment were the answer, if the Court please, then our system of penology would have eliminated most of the crime we have today, but it hasn't.

The Court: Certainly, counsel, I agree with you that some other method better than that should be found, but society has found no better method to deter the commission of crime, and I have nothing that I can do except to follow the law in my sincere judgment.

Mr. Katz: I believe that your Honor can impose a punishment here which can still be consistent with rehabilitation. It is my belief that if your Honor imposed a fine that in your Honor's opinion is in accordance with what would be paid by this defendant, together with the fact that he stands convicted and will continue to be so branded for the rest of his days, is more than ample punishment.

Mr. Robnett: Your Honor, in behalf of Mr. Ormont may I say also that in his instance you

know that there will be following matters of payment far in excess of what he may have dreamed; secondly, he is conducting a business with a lot of employees and the business would have to be closed up and all those employees thrown out. He has also I think as fine [1626] a reputation as any man that ever stepped into your courtroom, and I believe you believe that.

This indictment here, if your Honor should see fit to impose the penalty you suggested rather than a fine, would practically be ruinous to his life. He is a young man. I do believe that justice will be absolutely served by imposing such fine as your Honor may see fit, including the costs which will follow, of course, and without any serving of any time. I do ask your Honor to take into consideration the fact that Mr. Ormont cooperated very fully with the officers in all respects, gave them everything they asked for, and that that should, whether under the rule of the department or not, at least be worthy of some consideration. If he had tried to hide everything it would have been a different thing, but I think your Honor should take that into consideration in this case and impose a fine as ample punishment in addition to the punishment that he will suffer naturally from having been found guilty.

Thank you.

The Court: Mr. Strong?

Mr. Strong: Your Honor, this is an extremely serious offense. It occurred during the year 1944, when there was a lot of money being made, and

I think that it is very important in this case, not only in so far as these defendants are concerned but, as your Honor has pointed out, one of the ways of [1627] deterring crime is that sufficient punishment be given here, not merely a cutting in of the Government by a percentage of the fine, but a prison sentence of sufficient time so that not only these defendants will have time within which to become rehabilitated, but all other persons who are so minded as these defendants are to disregard the Internal Revenue laws of the United States will change their minds. This is not the place for them to do it. I suggest a substantial sentence should be given.

The Court: Mr. Himmelfarb or Mr. Ormont, do either of you want to make a statement?

The Defendant Himmelfarb: Your Honor, as far as myself is concerned, I had no intentions of evading any tax. I paid it. When people came in for any information they wanted, it was right there for them. There was no intention at any time to evade any tax.

The Court: Mr. Ormont, do you wish to say something?

The Defendant Ormont: I have tried to cooperate entirely all the way through this case with the Internal Revenue Department by divulging everything I had. I was a wide-open book for them. I certainly tried to give them every bit of cooperation, and if there was any tax due I wanted to pay it, and I admitted so. I don't know, I just tried to do the best I could under the circumstances.

The Court: As I said a while ago, it is a very difficult [1628] thing to deprive people of their liberty and send them to jail, but it is one of the things that must be done under the law if a judge follows the law and his judgment.

In giving this sentence I am taking into consideration the fact that each of the defendants have been convicted of a felony.

As to the defendant Sam Ormont, it is the judgment and sentence of the Court that he be committed to an institution to be selected by the Attorney General for the period of one year and one day.

As to the defendant Himmelfarb, it is the judgment and sentence of the Court that he be committed to an institution for a period of one year and one day.

There will be no fines.

Mr. Katz: If the ourt please, may we ask for a stay of execution for 60 days to permit these defendants to arrange for their affairs and put their business in order? They haven't had any time. This matter was just concluded.

The Court: Are they on bond now?

Mr. Strong: No, your Honor.

Mr. Robnett: They are not on bond in this case. They are on bond in the other case.

Mr. Strong: I hesitate to say that perhaps your Honor should give them some time because, as counsel says, they haven't had much of a chance.

The Court: I do not think they need 60 days. I think that a period of two weeks ought to be sufficient time for them to get their affairs in order.

Mr. Strong: I think they should be placed on bond.

The Court: And they should be placed on bond.

Mr. Strong: \$10,000 each.

The Court: Yes, \$10,000 bond.

There will be a stay of execution for a period of 30 days. The stay of execution will expire on July 16 at 12:00 o'clock noon.

Mr. Strong: Your Honor said there would be no fine. How about costs of prosecution?

The Court: No fine, no costs.

The stay of execution will expire on July 16 at 12:00 o'clock noon. The defendants will stand committed thereon but be released from now until July 16 at 12:00 o'clock noon on condition that each of them file a bond in the sum of \$10,000.

Mr. Robnett: Could we have 24 hours to file that, or 12 hours even, without them being committed? It would just be a matter of as quickly as we can getting the bonds. They have been out before on their O. R.

Mr. Strong: They can stay here and get a bond, your Honor.

Mr. Katz: These defendants came in this morning, if the Court please, to subject themselves to the sentence imposed. [1630] I think that they will return here within 24 hours, or at least the additional time of 24 hours, to permit them to procure

a \$10,000 bond, which is a substantial bond. It is not going to result in defeating the ends of justice.

The Court: I will stay the execution until 5:00 o'clock this afternoon and give them time to post bond.

Mr. Robnett: Thank you, your Honor.

Mr. Katz: It will not be necessary for them to appear if the bond is posted within that time?

The Court: That is right. Otherwise they will appear on July 16 at 12:00 o'clock noon. The stay of execution will expire at that date and hour.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court, for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 18th day of June, A. D., 1947.

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Official Reporter.

[Endorsed]: No. 11662, No. 11666. United States Circuit Court of Appeal for the Ninth Circuit. Phillip Himmelfarb, Appellant, vs. United States of America, Appellee. Sam Ormont, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed September 11, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
Ninth Judicial Circuit

No. 11666

SAM ORMONT and PHILLIP HIMMELFARB,
Appellants,

vs.

UNITED STATES OF AMERICA,
Respondent.

STATEMENT OF POINTS TO BE RAISED
BY APPELLANT ORMONT

To the Honorable Above-Entitled Court, to the
Judges Thereof:

The Appellant, Sam Ormont, through the undersigned, his attorneys, hereby submits the following statement of points which he proposes to raise and urge on this appeal:

(1) Said appellant hereby adopts, without the restatement thereof, each and all of the points specified and set forth in the "Designation of Record on Appeal and Statement of Points on Appeal" by defendant Sam Ormont filed in the District Court of the United States in and for the Southern District of California, Central Division, in this case, on or about the 21st day of June, 1947.

(2) In addition to the said points so adopted, said appellant also states the following points which he intends to raise and urge on said appeal:

(a) That the court erred in overruling the various objections made by and on behalf of this appellant to various questions propounded by the plaintiff's attorney to the various witnesses, which objections and rulings will be specifically designated and set forth in this appellant's brief;

(b) That the court erred in overruling this appellant's objections to various and sundry questions propounded by the plaintiff's attorney;

(c) That the court erred in admitting any evidence over the objections of this appellant;

(d) That the court erred in each particular wherein it admitted any testimony of any witness or permitted any question to be answered over the objection of this appellant;

(e) That the court erred in denying the various and sundry motions of this appellant to strike evidence from the record.

All the above specifications will be more particularly set forth in this appellant's brief, but this

appellant intends to urge error in each and every instance wherein the court overruled his objection and in each and every instance wherein the court denied this appellant's motion to strike evidence, and in each and every instance in which the court's ruling was adverse to this appellant.

(3) That the court erred in not instructing the jury, on the Court's own motion, that the jury might find this appellant guilty of a lesser offense than a felony charged in the indictment, which lesser offense was necessarily embraced within the charge in the indictment, to-wit, violating of Section 145(a).

(4) That the court erred in not instructing the jury, on the Court's own motion, that they might find this appellant guilty of a misdemeanor as defined in Section 145(a), to-wit, willful failure to keep any records, a misdemeanor embraced within but constituting a lesser offense than the felony charged in Count I of the indictment.

(5) That the court erred in not instructing the jury, on the Court's own motion, that they might find this appellant guilty of a misdemeanor as defined in Section 145(a), to-wit, willful failure to supply any information, a misdemeanor embraced within but constituting a lesser offense than the felony charged in Count I of the indictment.

(6) That the court erred in not instructing the jury, on the Court's own motion, that they might find this appellant guilty of a misdemeanor as defined in Section 145(a), to-wit, willful failure to

pay tax, a misdemeanor embraced within but constituting a lesser offense than the felony charged in Count I of the indictment.

(7) That the court erred in submitting the case to the jury, for the reason that there was a total failure of proof of the charge in Count 1 of the indictment, in that there was no proof of an evasion or attempted evasion by this appellant of the alleged income tax charged in said count of said indictment as the tax claimed to have been due, nor was there any proof of the evasion or attempted evasion by this appellant of substantially the amount so charged in said indictment.

(8) That the court erred in submitting the case to the jury, for the reason that there was no proof that the net income of this appellant, as charged in Count 1 of said indictment for the calendar year of 1944, was substantially the amount charged in said count of said indictment.

Dated this 10th day of September, 1947.

BENJAMIN F. KOSDON and

DALY B. ROBNETT,

By /s/ BENJAMIN F. KOSDON,

Attorneys for Appellant

Sam Ormont.

[Endorsed]: Filed Sept. 12, 1947.

Received This 11th day of September, 1947, a copy of the within Statement of Points To Be Raised by Appellant, in the Matter of Sam Ormont and Phillip Himmelfarb, Appellants, vs. United States of America, Respondent, Circuit Court No. 11666.

/s/ WILLIAM STRONG,
Assistant United States
Attorney.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF POINTS UPON WHICH
DEFENDANT PHILLIP HIMMELFARB
INTENDS TO RELY UPON APPEAL

To the Honorable Above-Entitled Court, and to the
Judges Thereof:

The Appellant, Phillip Himmelfarb, hereby submits, by and through his undersigned counsel, the following statement of points upon which said appellant intends to rely and urge on this appeal:

1. That the evidence admitted against defendant Phillip Himmelfarb in this case did not establish beyond a reasonable doubt the guilt of said defendant;
2. That the evidence established and disclosed that the verdict and judgment made and entered against defendant Phillip Himmelfarb are contrary to law;

3. That the verdict and judgment made and entered against defendant Phillip Himmelfarb are contrary to the evidence;

4. That the evidence against defendant Phillip Himmelfarb is manifestly insufficient to support the verdict of the jury;

5. That the evidence against the defendant Phillip Himmelfarb is wholly insufficient to show the guilt of said defendant beyond a reasonable doubt;

6. That the Court erred in denying the motion of defendant Phillip Himmelfarb for an acquittal, made at the close of the evidence of the prosecution;

7. That the Court erred in denying the motion for acquittal made by defendant Phillip Himmelfarb at the close of all of the evidence;

8. That the Court erred in denying the motion of defendant Phillip Himmelfarb for judgment of acquittal notwithstanding the verdict of the jury, and in denying the motion of defendant Phillip Himmelfarb made in the alternative, for a new trial;

9. That the Court erred in denying the motion of defendant Phillip Himmelfarb made at the close of evidence to strike evidence and exhibits theretofore received in evidence, from the record;

10. That the Court erred in admitting in evidence over objection of defendant Phillip Himmelfarb, Government's Exhibits No. 4, No. 5, No. 6, No. 34, No. 35, No. 36A, No. 44, No. 45, No. 50A, No. 50B, No. 50C, No. 50D, No. 52 and No. 54;

11. That the Assistant United States Attorney was guilty of misconduct in making repeated references in his opening and closing argument to the jury of other alleged crimes and offenses purportedly committed by defendant Phillip Himmelfarb, of which there was no evidence against said defendant, and by repeatedly stating to the jury that the source of the income upon which defendant Phillip Himmelfarb allegedly attempted to evade income taxes was over-charges, side payments and extra payments unlawfully collected and received in connection with the sale of meat, notwithstanding the fact that there was no evidence as against defendant Phillip Himmelfarb showing that such income or any income received by him was received from over-charges, side payments or extra payments received in connection with the sale of meat, or in any other unlawful transactions; all of which said statements were highly prejudicial to defendant Phillip Himmelfarb, and deprived him of a fair trial;

12. That the Assistant United States Attorney was guilty of misconduct in stating to the jury that a witness not called was accessible and available to defendant Phillip Himmelfarb, and that said defendant did not call such witness, and in stating or inferring that if the defendant Phillip Himmelfarb was innocent, why wasn't such witness called by defendant Phillip Himmelfarb to establish such innocence, and in rhetorically demanding, with respect to another witness called by the prosecution, why such witness was not called by said defendant

and put on the stand to testify respecting matters within the knowledge of such witness and to corroborate defendant Phillip Himmelfarb, if corroboration existed; all of which said statements were highly prejudicial to defendant Phillip Himmelfarb, and deprived him of a fair trial;

13. That the Court erred in instructing the jury as to the law of this case;

14. That the Court erred in the giving of instructions requested by the prosecution and excepted to by the defendant, and in refusing instructions requested by the defendant Phillip Himmelfarb;

15. That the Court erred in denying the motion of defendant Phillip Himmelfarb to dismiss the indictment;

16. That the Court erred in failing to grant in full the motion of defendant Phillip Himmelfarb for a Bill of Particulars;

17. That the Court erred in overruling the various objections made by and on behalf of the defendant Phillip Himmelfarb to the various questions propounded by plaintiff's attorney to the various witnesses who testified herein, which questions, objections and rulings will be specifically designated and set forth in the Brief to be filed by and on behalf of appellant herein;

18. That the Court erred in failing to instruct the jury as to Section 145a of the Internal Revenue Code and the law governing the offense in said section set forth, to wit: a misdemeanor embraced within the charge set forth in the indictment, but

constituting a lesser offense than the offense set forth in Section 145b of the Internal Revenue Code—a felony;

19. That the Defendant Phillip Himmelfarb was deprived of a fair trial and was prejudiced as the result of a subpoena duces tecum being served during the course of the trial and in the presence of the jury, upon his co-defendant Sam Ormont, by a marshal of the United States Marshal's office; and

20. That the Assistant United States Attorney was guilty of misconduct in that during the course of the trial and in the presence of the jury, he caused appellant's co-defendant, Sam Ormont, to be served with a subpoena duces tecum by a marshal of the United States Marshal's office.

Dated, at Los Angeles, California, this 15th day of September, 1947.

Respectfully submitted,

/s/. WILLIAM KATZ,

Attorney for Appellant,

Phillip Himmelfarb.

Service of the within and receipt of a copy thereof is hereby acknowledged, this 17th day of September, 1947.

JAMES M. CARTER,

United States Attorney, and

WILLIAM STRONG,

Assistant United States
Attorney.

By /s/ WILLIAM STRONG,

Attorneys for Respondent.

[nEodrsed]: Filed Sept. 23, 1947.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11662

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

And

No. 11666

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER DISPENSING WITH PRINTING
OF ORIGINAL EXHIBITS

Good cause therefor appearing, It Is Ordered that none of the original exhibits filed with the clerk of this Court in above causes need be printed within the printed transcript of record, but will be considered by this Court in their original form.

FRANCIS A. GARRECHT,
Senior United States Circuit
Judge.

Dated: San Francisco, Calif., October 30, 1947.

[Endorsed]: Filed October 31, 1947.

In the District Court of the United States in and
for the Southern District of California, Central Division

No. 19138

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM ORMONT and PHILLIP HIMMELFARB,
Defendants.

DESIGNATION OF RECORD ON APPEAL
AND STATEMENT OF POINTS ON AP-
PEAL BY DEFENDANT SAM ORMONT

To the Plaintiff in the Above-Entitled Case, and
to the Honorable James M. Carter, United
States Attorney, Howard B. Calverly, Chief,
Criminal Division, Assistant United States At-
torney, and William Strong, Assistant United
States Attorney, Attorneys for Plaintiff, and
to the Clerk of the Court:

Please Take Notice that the defendant Sam Or-
mont, having on the 24th day of June, 1947, filed
his Notice of Appeal from the judgment made and
entered and the sentence imposed on June 16, 1947,
and the order made and entered on June 16, 1947,
denying said defendant's motion for judgment of
acquittal notwithstanding the verdict, and motion,
in the alternative, for a new trial, said defendant
hereby designates the following portions of the
record, proceedings, and evidence, to be contained
in the record on appeal:

* * * * *

The points on which this defendant and appellant Sam Ormont intends to rely on appeal are:

1. That the Court erred in refusing to grant defendant Sam Ormont's motion to dismiss Count 1 of the indictment;

2. That the Court erred in refusing to grant defendant Sam Ormont's motion to dismiss Count 2 of the indictment;

3. That the Court erred in refusing to grant defendant Sam Ormont's motion to dismiss Count 3 of the indictment;

4. That the Court erred in refusing to grant defendant Sam Ormont's motion to dismiss Count 4 of the indictment;

5. That the Court erred in refusing to grant those portions of this defendant's motion for a Bill of Particulars which portions were by the Court denied;

6. That the defendant was taken by surprise because of the refusal of the Court to grant his motion for a Bill of Particulars in full;

7. That the Court erred in refusing to continue said case and direct a further Bill of Particulars at the time the case was called for trial on May 21, 1947;

8. That the Court erred in denying this defendant's motion made on the 21st day of May, 1947, to suppress all evidence as against this defendant;

9. That the Court erred in dismissing without the consent of this defendant the first jury impaneled and sworn in this court and cause to try this defendant, which jury was impaneled and sworn on

the 21st day of May, 1947, and which jury was by the Court dismissed and discharged on the 22nd day of May, 1947, without the consent of this defendant;

10. That the Court erred in denying this defendant's motion to dismiss said indictment and case and to enter his plea of once in jeopardy based upon the record in the case and the Minutes of the Court showing that a jury had been duly impaneled and sworn to try the defendant and was then discharged, which motion was made and denied on the 23rd day of May, 1947.

11. That the Court erred in denying the motion of this defendant, made on the 23rd day of May, 1947, for immunity of this defendant against prosecution in this case on the ground that said defendant theretofore, and before the voting and rendition of the indictment herein, had been subpoenaed before the Grand Jury of said court and compelled to give evidence before said Grand Jury against himself, and that he had not previously thereto been advised of his constitutional rights to counsel nor of his constitutional rights to refuse to answer any questions or give any testimony, or that any testimony he might give would be used against him.

12. That the Court erred in overruling defendant's objection to the introduction in evidence of Exhibits 1 through 5, inclusive, and also this defendant's objection, immediately following the offer of said exhibits, to the introduction of any evidence;

13. That the Court erred in holding, as against this defendant's motion to suppress all evidence and to require the plaintiff to furnish a Bill of Particulars and to dismiss the indictment, [272] that said matters had previously been ruled on by another judge, and therefore that such previous ruling was the law of the case;

14. That the Court erred in overruling this defendant's objection to the introduction of any evidence not embraced within the opening statement of the United States Attorney as to what they intended to prove, and particularly as to any evidence pertaining to the withholding of any information from the Government officers, or failure to disclose the sources of income, or any evidence of any matter not covered by the United States Attorney's opening statement;

15. That the Court erred in overruling defendant's objection to the introduction of Exhibit 3;

16. That the Court erred in allowing any of the evidence in this case to be introduced under Count 1 of said indictment upon the ground that there was no proper foundation therefor, in that the Government never established the filing by this defendant of the alleged "Income and Victory Tax report" for the year 1944, as alleged in Count 1 of said indictment, but in variance therewith allowed the prosecution to introduce a totally different instrument and allowed the jury to determine the case on such totally different instrument. to wit, upon an Income Tax return for the year 1944. which was not a part of the charge in said Count of said indictment.

17. That the Court erred in allowing any evidence to be introduced as against this defendant, under Count 1, pertaining to said Exhibit 3;

18. That the Court erred in denying this defendant's motion for acquittal on Count 1 at the close of the prosecution's evidence;

19. That the Court erred in denying this defendant's motion for acquittal on Count 1 at the close of all of the evidence;

20. That the Court erred in refusing to instruct the jury to acquit the defendant Sam Ormont on Count 1;

21. That the Court erred in denying this defendant's motion to strike out all the evidence pertaining to the years 1942 and 1943, and as to Counts 2, 3 and 4, made after said Court had acquitted said defendant on said Counts 2, 3 and 4.

22. That the Court erred in submitting to the jury all of the evidence in said case, and particularly that portion of the evidence in said case pertaining to the alleged offenses in Counts 2, 3 and 4 of said indictment, for the reason that said evidence was not pertinent to any issues in Count 1 of said indictment after this defendant had been acquitted on said Counts 2, 3 and 4, and it was prejudicial error and created a confusion in the minds of the jurors to submit said evidence to said jury.

23. That the Court erred in instructing the jury that they could take into consideration, under Count 1, evidence that was introduced under Counts 2, 3 and 4, for the purpose of determining wilfulness or intention.

24. That the Court erred in instructing the jury as to the law of this case, and particularly in refusing to give the instructions requested by this defendant.

25. That the evidence in this case did not establish beyond a reasonable doubt the guilt of this defendant under Count 1.

26. That the evidence established and disclosed that the verdict and judgment made and entered against defendant Sam Ormont are contrary to law.

27. That the verdict made and entered against this defendant is contrary to the evidence.

28. That the judgment entered against this defendant is contrary to the evidence and to the law.

29. That the evidence against this defendant is manifestly insufficient to support the verdict of the jury.

30. That the evidence against this defendant is wholly insufficient to show the guilt of this defendant beyond a reasonable doubt.

31. That the evidence is wholly insufficient against this defendant to show beyond a reasonable doubt that said defendant wilfully committed any acts charged in Count 1 of the indictment.

32. That the Court erred in denying the motion of defendant Sam Ormont for an acquittal notwithstanding the verdict of the jury, and in denying the motion of this defendant, made in the alternative, for a new trial.

33. That the Court erred in admitting privileged communications between this defendant and his attorney, to wit, Exhibits 51-A, 51-B and 51-C.

34. That the Court erred in giving instructions requested by the prosecution and excepted to by this defendant, and in refusing instructions requested by this defendant, and in refusing instructions requested by his co-defendant Phillip Himmelfarb.

35. That the Court erred in refusing to acquit this defendant, by reason of the fact that the evidence indicated that the defendant cooperated with the Treasury Department, and that the policy of the Treasury Department has been since 1932 or thereabouts and to the present date that it would not recommend anyone for prosecution who cooperated with the Internal Revenue Department, and that without the evidence furnished by the defendant the Treasury Department would not have had any facts upon which to base an indictment against said defendant.

36. That the Court erred in refusing to strike all the evidence and conversations of the Government witnesses, Eustice, Burcher and Phoebus on the ground that said evidence and conversations, made to said witnesses or secured by said witnesses, were so made to said witnesses or secured by said witnesses by promises of immunity, fear or threats made by said witnesses against said defendant.

37. That the Court erred in permitting the witness Eustice to testify to matters of hearsay and to base hearsay evidence upon hearsay and opinion evidence upon hearsay evidence.

38. That the Court erred in permitting the witness Malin to testify over the objection of this defendant, on the ground that said testimony was privileged.

39. That the Assistant United States District Attorney was guilty of misconduct in that during the course of the trial and in the presence of the jury he caused the defendant Sam Ormont to be served with a subpoena duces tecum by a Marshal of the United States Marshal's Office.

40. That the Assistant United States District Attorney was guilty of misconduct in that in his closing argument he made repeated references to other alleged crimes and offenses by repeatedly stating to the jury that the source of the income upon which said defendant attempted to evade income taxes was overcharges, side payments and extra payments received in connection with the sale of meats, without any showing in the evidence that said alleged overcharges, side payments or extra payments were in truth and in fact unlawful.

41. That the Assistant United States District Attorney was guilty of misconduct in that he stated to the jury that a witness who was not called by the defense was accessible and available to the defendant, but that said defendant did not call such wit-

ness, and stated or implied the question that if defendant was innocent why was not such witness called to establish such innocence? All of which said statements were highly prejudicial to defendant and deprived him of a fair trial.

Dated at Los Angeles, California, this 26th day of June, 1947.

BENJAMIN F. KOSDON and
DALY B. ROBNETT,

By BENJAMIN F. KOSDON,
Attorneys for Defendant
Sam Ormont.

Received copy of the within Designation of Record on Appeal, Statement of Points on Appeal by defendant Sam Ormont, this 26th day of June, 1947.

/s/ JAMES M. CARTER,
U. S. Attorney.

By /s/ VELOVIS BARKIS,
Attorney for Plaintiff.

[Endorsed]: Filed June 26, 1947.